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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

JULY TERM, 1879, JANUARY TERM, 1880,

AND

INCLUDING A PART OF THE JULY TERM, 1880.

C. B. BELLINGER,
REPORTER.

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Rec. Oct 26, 1880

JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

JAMES K. KELLY (Chief Justice) .. Term expired July 4, 1880.
R. P. BOISE .. Term expired July 4, 1880.
P. P. PRIM .. Term expired July 4, 1880.
WM. P. LORD (Chief Justice) .. Term expires first Monday in July, 1882.
E. B. WATSON .. Term expires first Monday in July, 1884.
JNO. B. WALDO .. Term expires first Monday in July, 1886.

P. H. D'ARCY, Clerk up to July Term, 1880.
Succeeded by T. B. O'DNEAL.



ROLL OF ATTORNEYS

ADMITTED DURING THE TERM OF THESE REPORTS.

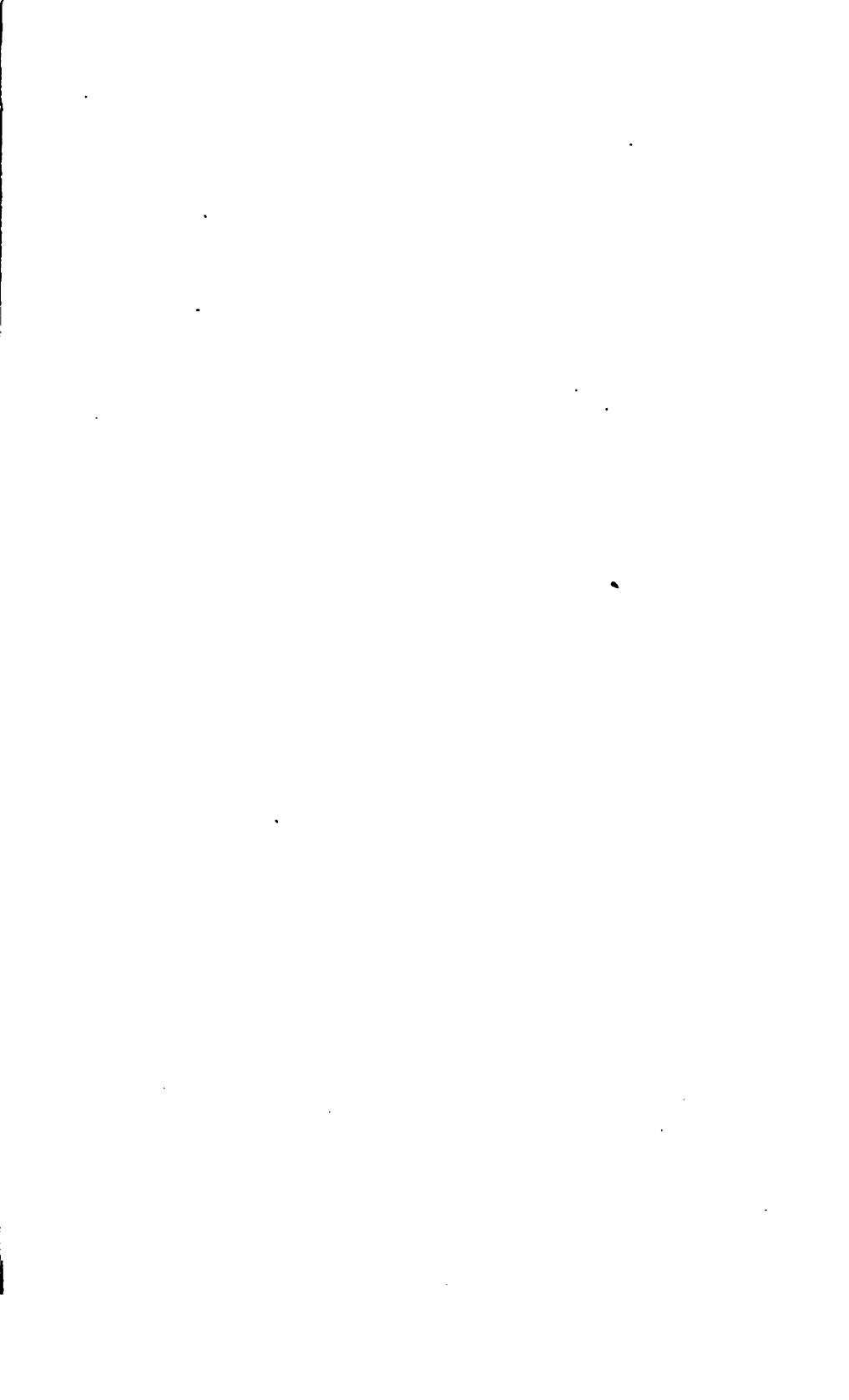
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P. P. PRIM,	



The decisions of the July Term, 1880, contained in this volume, include all that were rendered prior to August twenty-second of this year, and comprise about one half of the decisions of the term, the remainder having been filed since this volume went to press.



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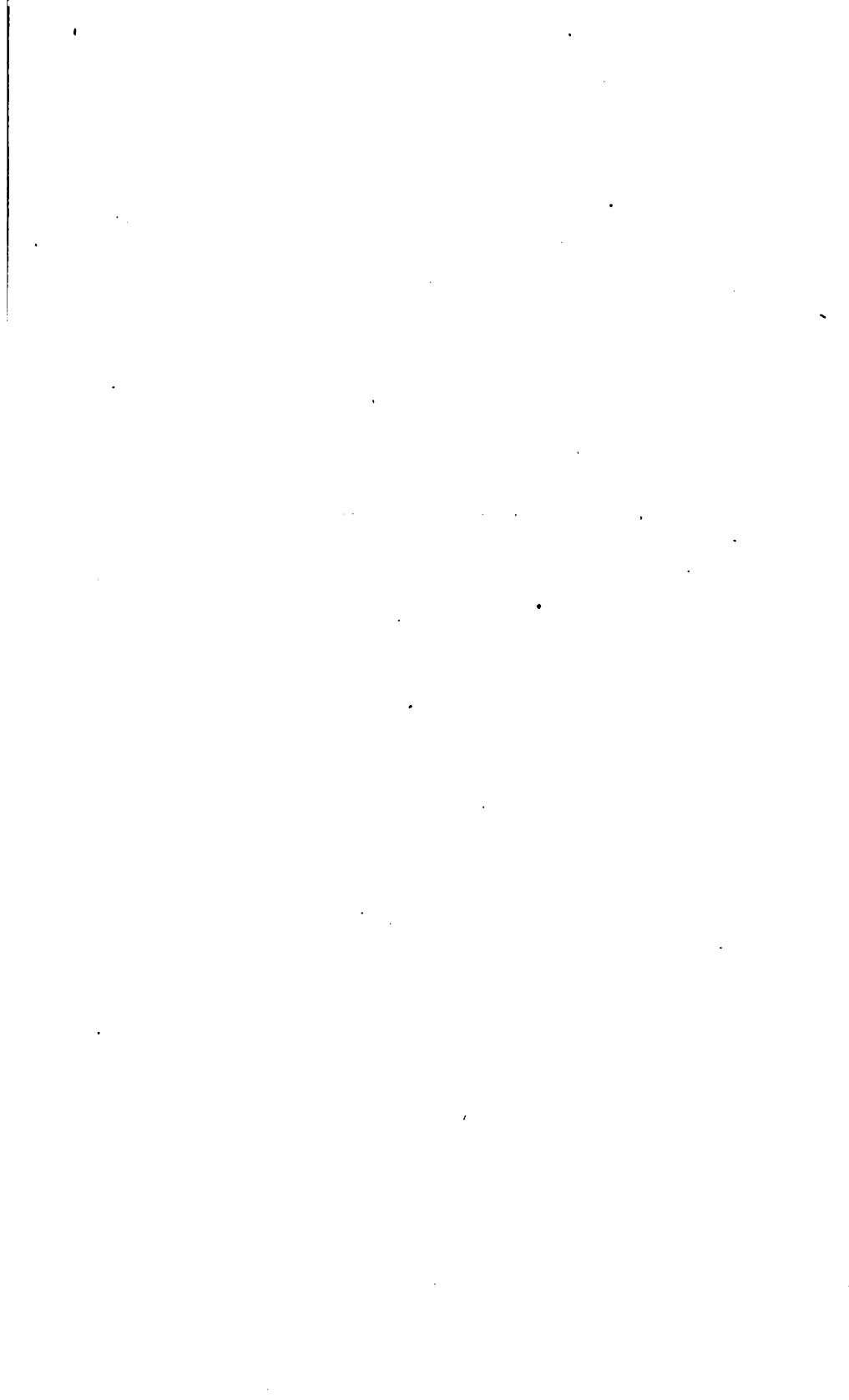
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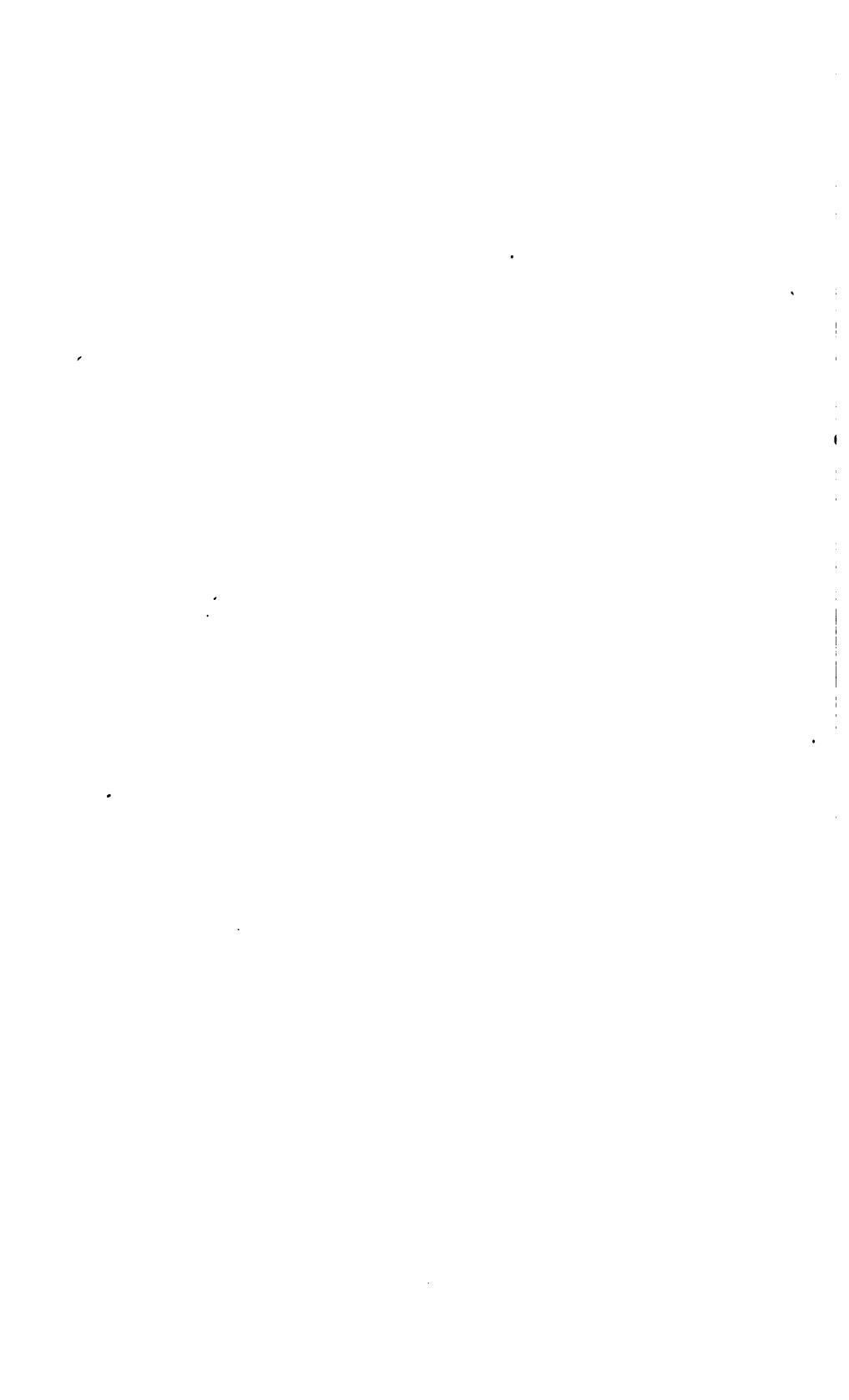
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JULY TERM, 1879.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JULY TERM, 1879.

THE SINGER MANUFACTURING COMPANY, RESPONDENTS, *v.* W. K. GRAHAM ET AL., APPELLANTS.

BILL OF EXCEPTIONS—JUDGE MUST SIGN.—A statement containing the testimony given and the rulings of the circuit court excepted to on the trial, although certified to be correct by the attorneys of both parties, does not become a bill of exceptions unless signed by the judge, and can not be considered as such on an appeal to the supreme court.

FOREIGN CORPORATION—APPOINTMENT OF ATTORNEYS—CORPORATIONS NOT NAMED IN TITLE OF ACT.—The act of the legislative assembly entitled, "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in the state," cannot, under section 20 of article 4 of the constitution, be construed to contain any provision in relation to any foreign corporation other than those expressly specified in the title of the act.

SALE, WHAT DOES NOT CONSTITUTE—MONTHLY PAYMENTS.—Where the owner of an article of personal property, under an agreement in writing, delivered the same to another person to be used by him at the stipulated price or hire of ten dollars per month, to be paid monthly until the sum of sixty-five dollars should be paid, when the title to the same was to become vested in the person paying the money, the agreement did not constitute a sale. Under such agreement the title did not pass to the party receiving the property, and a sale of it by him to a *bona fide* purchaser conveyed no title.

APPEAL from Linn County. The facts are stated in the opinion.

Weatherford & Blackburn, N. B. Humphrey, and W. G. Piper, for appellants.

Conley & Hewitt and Dolph, Bronaugh, Dolph & Simon, for respondents.

Opinion of the Court—Kelly, C. J.

By the Court, KELLY, C. J.:

This action was brought in a justice's court to recover the value of a sewing machine alleged to be the property of the respondent, and alleged to be wrongfully detained by the appellants and converted to their own use. Judgment was there rendered in favor of the respondent, from which an appeal was taken to the circuit court, and upon trial that court rendered a judgment also in favor of the respondent. The case comes here without any bill of exceptions signed by the judge who tried the cause. There is, it is true, a statement of the case certified to be correct by the attorneys of the respective parties, which would have been sufficient under section 526, page 211, of the civil code, as it existed prior to the amendment of that section by the act approved October 28, 1874. (Session laws of 1874, p. 96.) As amended, this statement is not a part of the judgment roll, and cannot therefore be included in the transcript of the cause required by section 531 of the civil code to be filed in this court. This statement is not properly a part of the record, as it was not signed by the judge of the court below, and consequently we cannot examine any of the alleged errors specified therein. We can only consider the objection raised by the demurrer to the complaint, that it does not state facts sufficient to constitute a cause of action.

The complaint is in substance as follows: That the said plaintiff is a corporation formed under the laws of New York and New Jersey, and doing business in this state as a corporation. That on or about the eleventh day of June, 1878, in the county clerk's office of the county of Multnomah, the said corporation filed a power of attorney appointing one Willis B. Fry, who is a citizen of the United States, and a citizen and resident of the state of Oregon, its legal attorney in fact, etc. That on or about the fifteenth day of July, 1878, said plaintiff was the owner and entitled to the possession of one Singer sewing machine valued at sixty-five dollars; that on said fifteenth day of July, 1878, the said plaintiff gave one of the said defendants, to wit, Frank Morgan, the possession of said sewing machine, upon the terms and in accordance

Opinion of the Court—Kelly, C. J.

with the conditions and agreements expressed in a contract of which the following is a copy, to wit:

“HARRISBURG, Oregon, July 15, 1878.

“Received from the Singer Manufacturing Co., corner First and Yamhill streets, Portland, Oregon, one new No. 4 medium sewing machine, No. 1,937,680, value, sixty-five dollars (\$65 00) U. S. coin, on hire at ten dollars (\$10) U. S. coin, per month, payments to be made monthly in advance. I hereby agree not to remove the machine from my residence, situate in or near Harrisburg, Linn county, Oregon, without the consent of the Singer Manufacturing Company. And I also agree to pay the monthly installments punctually; or, failing in either of the above, I agree to relinquish all claims on the above machine, and to return it, or cause it to be returned, to the Singer Manufacturing Co., at my own expense; and if I sell, loan, or otherwise dispose of the above machine, I hold myself liable to the full penalty of the law.

(Signed name in full.)

“FRANK MORGAN.

“NOTE.—When \$65 U. S. coin, the value of this machine, has been paid, the machine with this contract shall belong to Frank Morgan. For a valuable consideration, received from the Singer Manufacturing Co., I hereby guaranty the faithful performance of the within contract made this day by —.

“Dated this 15th day of July, 1878.

“JNO. A. BROWN, Agent.”

That said Morgan paid the company in all twenty-five dollars; that he has failed to perform the conditions of his contract; that said Frank Morgan, on or about the second day of January, 1879, for the purpose and with the intent to defraud this plaintiff, gave the possession of said machine to the said defendants, W. R. Graham and Richard Graham, and that said defendants, W. R. Graham and Richard Graham, well knew the conditions of said contract with the defendant Frank Morgan, and that they took the same for the purpose

Opinion of the Court—Kelly, C. J.

of defrauding this plaintiff. That the said defendants have wrongfully and willfully converted said property to their own use, to the damage of this plaintiff in the sum of sixty-five dollars. That on or about the —— day of January, 1879, the plaintiff demanded of said defendants that they return to him the possession of said sewing machine, but they refused, and still refuse, to give up the possession of said property.

Wherefore plaintiff demands judgment, etc.

To this complaint the respondent demurred, upon the following grounds:

1. The court has no jurisdiction of the persons of these defendants, or the subject matter of the action.
2. The plaintiff has no legal capacity to sue.
3. There is a defect of parties defendant.
4. The complaint does not state facts sufficient to constitute a cause of action against the defendants.
5. The contract set forth in the complaint is contrary to the policy of the law, and void as to these defendants.

The first and third causes of demurrer do not require any consideration. There is nothing in them. Under the second ground specified in the demurrer, it is claimed by the appellant that the respondent had no legal capacity to maintain this action, because it is a foreign corporation, and therefore could not lawfully transact any business in this state until it had executed a power of attorney and caused the same to be recorded, as required by sections seven and eight of chapter twenty-four of the miscellaneous laws of Oregon, page 617.

On the part of the respondent, it is claimed that the provisions of those sections do not apply to the Singer manufacturing company, because it is neither an insurance, banking, nor express and exchange corporation or association. Section twenty of article four of the constitution declares that, "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." On October 21, 1864, the legislative

Opinion of the Court—Kelly, C. J.

assembly passed an act containing the two sections before referred to, entitled, "An act to regulate and tax foreign insurance, banking, express, and exchange corporations or associations doing business in the state." As was stated by this court in *Simpson v. Bailey*, 3 Or. 515, the constitutional provision above quoted was evidently "to prevent matters wholly foreign and disconnected from the subject expressed in the title from being inserted in the body of the act." In the ordinary course of legislation, it is impossible for every member of the legislative body to have the same information, or the same means of knowing what is contained in the bill, as the member who frames or the committee that considers it, and they have a right, therefore, to rely on the supposition that there is nothing contained in the body of the bill except what is expressed in the title, or such matters as are properly connected therewith. It was intended by the framers of the constitution to be a proper restraint upon inconsiderate or unsuitable legislation, that this provision was inserted in that instrument; and it should not be frittered away or disregarded either by the legislative or the judicial department of the government. And inasmuch as the title of the act referred to purports to regulate and tax "foreign insurance, banking, express, and exchange corporations or associations," the provisions of sections seven and eight of chapter twenty-fourth of the miscellaneous laws, p. 617, should be restricted to them alone, and should not be construed so as to include foreign corporations engaged in other enterprises within this state. The same construction was placed upon those sections by the United States circuit court for the district of Oregon in a well considered case. (*Oregon and Washington Trust Investment Co. v. Rathburn*, 5 Sawyer.)

As it does not appear from the pleadings in this case that the respondent was a foreign corporation doing business within the state as an *insurance, banking, express, or exchange* corporation or association, it does not come within the purview of the decision of this court in the case of *The Bank of British Columbia v. Page*, 6 Or. 431, and we hold that it had a right to bring and maintain this action. It is also

Opinion of the Court—Kelly, C. J.

contended on the part of the appellant that there was a sale and delivery of the sewing machine to the defendant, Morgan, and that the title to it became vested in him, and he had a right to sell it to them discharged from any lien for the balance of the purchase-money due to respondent, and that it is against public policy for the vendor of a chattel to retain a secret lien for the purchase price of it. In this case we must take the contract to be as it is set forth in the complaint. The demurrer admits it to be correct and true.

By the terms of the agreement, the sewing machine was to continue to be the property of the respondent, and was merely hired to Morgan for ten dollars per month, payable monthly, with the right of respondent to have it returned in case of a failure to pay the monthly installments as they became due. It was further agreed that whenever the sum of sixty-five dollars should be paid in this way, the machine should then become the property of Morgan. There is no doubt it was the intention of both parties to the contract that the title to the sewing machine was to remain in the respondent until sixty-five dollars should be paid, and then, and not before, it was to become the property of Morgan. It was only a conditional sale, accompanied by the possession, which Morgan was permitted to retain until the condition was broken. Under these circumstances, he had no right to sell the property, and the appellants, although *bona fide* purchasers, acquired no better title than Morgan had. This is too well settled now to admit of any doubt. (*Ballard v. Bargett*, 40 N. Y. 314; 79 Penn. Stats. 488; 98 Mass. 149; *Kohler v. Hayes*, 41 Cal. 455; Benjamin on Sales, sec. 320, and note *d.*) The complaint contains a sufficient allegation that the respondent demanded the return of the property by appellants, and that they refused to return it, but converted it to their own use.

The judgment of the court below is affirmed.

Argument for Appellant.

**CHARLES W. LOVE, APPELLANT, *v.* MARY A. J. LOVE,
RESPONDENT.**

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DONATION ACT—FINAL PROOF—DOWER.—The widow of a donee holding under the fourth section of the donation act, when such donee dies before final proof is made, is entitled to dower in her husband's half of the claim.

IDEM—HUSBAND'S ESTATE, HOW DESCENDS.—When such donee dies after four years' residence and cultivation, but before final proof is made, his widow is entitled to an equal portion with the children or heirs of the deceased, in fee, and to dower in the remaining portion which descends to the children or heirs.

APPEAL from Lane County. The facts are stated in the opinion.

W. G. Piper and John Kelsay, for appellant:

A party can not be the owner in fee of land, and at the same time have dower in it. The dower will be merged in the fee. (2 Blackstone's Commentaries, 130.) "Dower is for the sustenance of the wife and the nurture and education of the children." (1 Wash. on Real Prop. 170.) One half of the donation is given to the widow in her own right; the other one half is disposed of by this act without dower attaching, especially when the husband dies before patent issues, and before final proof. Dower cannot attach to a donation claim until all the conditions have been complied with. (1 Deady, 113; 5 Or. 202.) Dower is a continuance of the husband's interest and estate. (1 Wash. on Real Prop. 179; 5 Or. 204; 1 Sawyer, 253; Id. 273; 4 Or. 155.) Where a donation claimant dies before patent issues, and before final proof, the land does not descend to his heirs as such, but to the person designated in the act. (1 Deady, 358; 13 Wall. 428.) Residence, cultivation, and final proof are absolutely necessary conditions to be complied with before a donation claim ceases to be an estate upon condition. If such be the law, then dower does not attach. (1 Deady, 113.)

Section 4 of the donation law reads as follows: "And if either shall have died before patent issues (speaking of husband and wife), the survivor and children or heirs of the

Argument for Respondent.

deceased shall be entitled to the share or interest of the deceased in equal portions." If they take an equal portion and not by descent from the deceased, but by purchase as the donees from the United States, then the widow or respondent in this case can take no dower, as that makes an inequality. (1 *Deady*, 382.) In 2 of Oregon, 32 and 33, the court held that dower did not attach to a donation claim until the conditions of the act had been complied with. Final proof is a condition. Dower will not attach to an equity. (2 *Or.* 34.)

In this case there can not be dower and fee in the respondent. Dower merges in fee. "A merger takes place when there is a union of the freehold or fee and the term in one person in the same right and at the same time. The greater estate merges and drowns the less, and other terms become extinct because they are inconsistent, and it would be absurd to allow a person to have two distinct estates immediately expectant on each other." (4 *Kent Com.* 99). "As a general principle, dower is liable to be defeated by every subsisting claim or incumbrance in law or equity existing before the inception of the title." (4 *Kent*, 51, 52; 16 *Ill.* 122; *Lambert on Dower* 23; 15 *Johns.* 458.) Where a greater and less estate coincide and melt in one and the same person without any intermediate estate, the less is merged, that is, sunk. Hence we say that dower and an estate in fee cannot descend and vest in the respondent at the same time. That dower is merged and no longer exists is clear. (2 *Black Com.* 177; 1 *Johns. Ch.* 417; 3 *Mass.* 172; 10 *Vt.* 293; 8 *Watts Penn.* 146.)

The respondent does not ask for dower in her answer, and the court erred in granting such dower, there being no allegation to that effect. Title cannot be inferred; it must be alleged and proved from the pleadings. (Code, chap. 5, sec. 420, and sec. 5, subd. 3; 4 *Or.* 30.)

Thompson & Bean, for respondent:

The settlement, residence upon, and cultivation of said premises by said Hugh Love and respondent as required by the donation law, and the death of Hugh Love after the

Argument for Respondent.

compliance with the provisions of said law, and before patent or a certificate for a patent issued, is admitted by the pleadings and stipulations of this cause; therefore, respondent, the surviving widow of said Hugh Love, is entitled to a child's portion, or to share equally with the children or heirs of said deceased, in his half of said donation claim. (Donation act, sec. 4; *Dolph v. Barney*, 5 Or. 204; *Lamb v. Starr*, 1 Deady, 357). The widow of every deceased person should be entitled to dower, or the use during her natural life, of one third part of all lands whereof her husband was seised of an estate of inheritance, at any time during marriage, unless she is lawfully barred thereof. (Misc. Laws, chap. 17, sec. 1.) A settler, under the donation law, is seised of an estate of inheritance; therefore his widow is entitled to dower. (Civ. Code, sec. 329, p. 178; *Chapman v. School Dist. No. 1*, 1 Deady, 113; *Adams v. Burke*, 3 Saw. 416; *Lamb v. Davenport*, 1 Saw. 632; *Dolph v. Barney*, 5 Or. 201; *McKay v. Freeman*, 6 Or. 456.)

This court has decided that if a donation claimant, under the fourth section of the "donation law," complies with the conditions of the act so as to entitle him to a patent, and then dies before the issue of donation certificate or patent, his widow is entitled to dower in the tract. (*McKay v. Freeman*, 6 Or. 449.) The effect of a judgment or decree in partition is to be determined by the statute and met by the common law. (*Bybee v. Summers*, 4 Or. 356; *Morenhout v. Higuera*, 32 Cal. 289; *Kester v. Stark et al.*, 19 Ill. 328; 1 *Washburne on Real Property*, 580; *Waterman v. Lawrence*, 19 Cal. 210.)

The court, in a suit for partition, must determine the rights of the parties, plaintiff as well as defendant, from the facts presented, and make a decree accordingly. (Civ. Code, chap. 5, secs. 425, 426; *Freeman on Judgment*, sec. 304.) It is not essential that respondent's title be distinctly averred. It is sufficient if it may be fairly inferred from the facts stated. (*Webber v. Gage*, 39 N. H. 182; *Story's Equity Pleadings*, sec. 730; *Green v. Palmer*, 15 Cal. 414; *De Uprey v. De Uprey*, 27 Cal. 335.)

A prayer for general relief is sufficient, and will entitle

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the respondent in this action on the final hearing to such a decree as her case may warrant. (Story Equity Pl. sec. 40; *Humphrey v. Foster*, 13 Gratt. Va. 653; *McGlothlin et al. v. Hemery et al.*, 44 Mo. 350; *Rollins v. Forbes and wife*, 10 Cal. 299; *Wilkins v. Wilkins*, 1 Johnson Ch. 110.)

By the Court, BOISE, J.:

It appears from the admitted facts in this case that the respondent was the wife of Hugh Love, who with her, in 1852, took a land claim in Lane county, in this state; that they resided on and cultivated the same until the death of Hugh Love, in 1861; that at the time of the death of Hugh Love, final proof had not been made so as to entitle said Hugh Love and wife to a patent from the government, although at that time the residence and cultivation required by section 4 of the act of the twenty-seventh of September, 1856 (called the donation law), had been completed. Afterwards Mary Love, the respondent, made the necessary proof, and in 1866 the patent was duly issued. At the time of his death Hugh Love left surviving him two children and his widow, Mary Love. Afterwards Mary Love purchased the interest of one of the children, Hannah Browning, and received a deed for her interest in said south half of said donation land claim, which south half was set off to the heirs of said Hugh Love.

This being a suit for a partition of this land, it is incumbent on the court first to determine who are the owners thereof. (Statutes, p. 199, sec. 425.) The first question to be determined is: Who, under the facts as set forth, are the owners of said south half? Section 4 of the donation law provides that "in all cases where married persons settling under the provisions of said section have complied with the provisions of the act so as to entitle them to the grant, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except in case of a will. Hugh Love and wife, at the time of his death, had completed the four years' residence required by the act. But in order to entitle them to a

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patent it was necessary, as provided in section 6 of said act, that they should make proof of the fact of four years' residence and cultivation required by said act. This not being done, they were not entitled to a patent. Afterwards the widow made the proof and became entitled to one half of the claim, and of one third of the other half, as no patent had issued or could issue until the proof was made. We think the rule is that the land, on the death of a settler before he is entitled to a patent, by reason of not having fully performed the residence and cultivation and made the proofs, descends to the widow and children, as heirs, in equal proportions. For a patent will not relate back so as to bar the right of the widow to hold as survivor, any further than to the time when the patentees had performed all the conditions precedent, so as to entitle them to it, which conditions required proof of the facts of residence and cultivation in addition to the residence and cultivation themselves. The amendment to the land law of July 17, 1854, which repealed the proviso of said fourth section "that all future contracts by any person or persons entitled to the benefit of this act for the sale of the land to which he or she may be entitled under this act, before he or they have received a patent therefor, shall be void," we think so far modified the rights of parties holding under said section as to subject the land to the local laws of the territory, and cause them to descend under such laws where the parties had in all respects complied with the law so as to entitle them to a patent. That is, that a patent when issued relates back to the time when it should have issued; that is, to the time when full and satisfactory proof had been made; and that from that time the land would descend as provided by our statute of descent. In *Dolph v. Barney*, recently decided in the United States supreme court, it is held that the amendment of July 17, 1854, has modified the donation law in this behalf. In the case before us the final proof was not made until after the death of Hugh Love. Mary Love took by survivorship one third of said south half of said land. Then having purchased one third from Mrs. Browning, she would own the fee in two thirds of the land, and her right of

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dower in that third would be merged as well as in the third coming by survivorship.

The only remaining question is whether Mary Love is entitled to dower in the remaining one third of the land claimed by the appellant, Charles Love. This must be determined by the construction of the statute. Page 584, section 1, provides, "That the widow of every deceased person shall be entitled to dower, or the use during her natural life of one third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." It has been held by this court, in the case of *Dolph v. Barney*, that a grant to a settler under the donation act is a grant *in presenti* of an estate in fee, and this holding was affirmed in the same case by the supreme court of the United States. So the question is settled that one holding under the donation law became, from the time of filing his notification in the land office, seised of an estate of inheritance, which is an estate to which dower attaches, under the provisions of the statute. That this estate was subject to be defeated by the failure of the settler to comply with the conditions of the grant, did not prevent the right of dower from attaching to it, for until such failure, it was subject to be possessed and enjoyed in the same manner as though there were no conditions to be performed. It has been decided in this court (*McKay v. Freeman*, 6 Or. 449) that where a donation claimant, under the fourth section of the act, died before making final proof, but after four years' residence and cultivation, his widow was entitled to dower in his half of the claim, and the decision in that case is decisive of this, as far as the question of dower is concerned.

The questions above discussed embrace all the points necessary to be considered in this case, and the decree of the circuit court will be affirmed with costs.

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A. B. HALLOCK, RESPONDENT, v. THE CITY OF PORTLAND, APPELLANT.

FINDINGS ON TRIAL BY THE COURT, HOW REGARDED.—When a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed as a verdict, and may be set aside in the same manner and for the same reasons, as far as applicable, and a new trial granted.

IDEM—NEW TRIAL, WHEN A MATTER OF DISCRETION.—The refusal to grant a new trial on the ground that the evidence was insufficient to justify the finding of fact, is a matter resting in the sound discretion of the court below, and cannot be reviewed on appeal. The findings of fact by the court below must be accepted as correct until set aside in that court.

APPEAL from Multnomah County. The facts are stated in the opinion.

J. C. Moreland, City Attorney, for appellant.

Reed and Bingham, for respondent.

By the Court, PRIM, J.:

This action was brought by respondent to recover back money alleged to have been paid under a mistake, believing at the time that he was indebted to the appellant by reason of a judgment of the circuit court of the state of Oregon for the county of Multnomah, bearing date of October 14, 1874, claiming now that said judgment had been satisfied and paid by sale of respondent's property on execution. The answer denies that there was any mistake, or that the judgment was ever satisfied. And for further defense alleges that the said judgment, including interest, amounted to one hundred and thirteen dollars and sixty-five cents, and the execution referred to in the complaint was in a suit wherein Ladd & Tilton were plaintiffs, A. B. Hallock defendant, and the Bank of British Columbia and the city of Portland were joined as subsequent lien-holders on said Hallock's property; that said execution was returned satisfied by the sheriff, but in truth and fact there was not enough money collected thereon to pay all of said liens, and that the return of the execution satisfied was a mistake. The replication alleges that sufficient money was realized out of the sale of

8	29
12	156
12	315
19	71
19	186
6*	648
7*	312
23*	816
23*	142
8	29
24	70
32*	1034
8	29
29	288
8	29
147	80

Points decided.

said property of the respondent by the sheriff to satisfy said judgment in full.

This case having been tried by the court without the intervention of a jury, the court thereupon made the following findings of fact and law:

On looking into the bill of exceptions we find that the only exception taken and the only error alleged, was the refusal of the court below to grant a new trial. When the trial of a case is had before the court without the intervention of a jury, "the findings of the court upon the facts shall be deemed as a verdict, and may be set aside in the same manner and for the same reasons as far as applicable, and a new trial granted." (Civ. Code, 149, sec. 217.)

As the motion for a new trial was based wholly upon the insufficiency of the evidence to justify the finding of fact, the granting of the motion was a matter resting wholly in the discretion of the court below and can not be reviewed on appeal. (*State of Oregon v. Wilson*, 6 Or. 428; *State v. Fitzhugh*, 2 Or. 227; *Hilliards on New Trials*, 7.)

The evidence submitted on the trial is substantially reported in the bill of exceptions, but this court can not look into it in order to ascertain what the facts are. The finding of the court below is conclusive upon that matter here. It appears from the evidence as found by the court that the execution referred to in the pleadings was returned by the sheriff "satisfied in full." But it is claimed that there was evidence tending to show that the return of the sheriff was incorrect; but that matter can not be looked into here, as this court must accept the finding of the court below as correct on the issues of fact.

The judgment of the circuit court is affirmed.

8	30
18	365
19	215
23*	252
23*	969
8	30
28	338

THE STATE OF OREGON, RESPONDENT, *v.* AZELL ODELL, APPELLANT.

CRIME—ACCOMPlice, TESTIMONY OF.—In a criminal case the testimony of an accomplice is not alone sufficient to warrant a conviction.

IDE^M—CORROBORATING TESTIMONY.—Proof that the prisoner was in the same town about the time of the alleged commission of the crime is

Statement of Facts.

not alone sufficient to corroborate the testimony of an accomplice and warrant a conviction, and it is the duty of the court to so instruct the jury when asked to do so by the defendant.

APPEAL from Yamhill county.

The appellant was jointly indicted with one Moran for the crime of larceny in a store. Moran not being in custody, the appellant was tried separately. Upon the trial the district attorney called only three witnesses on behalf of the state: William George, L. C. Forest, and James Fowler, and no testimony was introduced on the part of the defendant except as to the general reputation of the witness, George, for the purposes of impeachment.

William George testified, in substance, that about the time charged in the indictment, he (witness) and defendants Odell and Moran, were together in Fowler's saloon; and that the defendant Odell went out and directly returned and informed witness and Moran that he (Odell) had unlocked the store-room named in the indictment, and wanted them to go with him; that they went with him and found the store-room unlocked, and that Moran went in and carried out the property named in the indictment, while defendant Odell and witness watched on the outside to see if any one was watching them: in other words, witness and defendant Odell "stood guard," one on either side of the house, while Moran carried out the property: that he (witness) furnished Moran matches to light the store-room, and when the property was brought out they all put it in the wagon and carried it away, all going away together. The witness, George, swore to every material fact charged in the indictment, and that he was present aiding and abetting in the commission of the offense. L. C. Forest testified that he was a member of the firm of Hendrix and Forest, mentioned in the indictment; that said Hendrix and Forest were the owners of the property charged to have been stolen, and that near the time named in the indictment he had missed from their store-room a sack of flour, but nothing else. James Fowler testified that about the night named by witness, George, the defendants, Odell and Moran, and the witness, George, were

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together in his saloon and were drinking freely; that they went away about ten o'clock, when he closed his saloon.

After the testimony was closed, the defendant's counsel submitted and asked the court to give the jury the following instructions, which were refused:

1. That a conviction of the defendant, Odell, can not be had upon the evidence of the accomplice, George, unless he be corroborated by other evidence tending to show the connection of defendant, Odell, with the commission of the crime charged in the indictment, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances of the commission.

2. The fact of the presence of the defendant, Odell, in the same town at the time of the commission of the offense, or immediately before or afterward, is not sufficient evidence to connect the defendant, Odell, with the commission of the crime charged in the indictment.

3. The fact that the injured persons (Forest and Hendrix) missed from their store-room about the time charged in the indictment, a part of the property charged in the indictment to have been stolen, is not alone sufficient evidence of the commission of the crime of larceny, or any crime, and is not any evidence to connect the defendant with the commission of the crime charged in this indictment.

The defendant was found guilty as charged, and from the judgment of conviction this appeal is taken.

McCain & Fenton, for appellant.

J. J. Whitney, District Attorney, and E. C. Bradshaw, for the state.

By the Court, BOISE, J.:

All the evidence in this case is set out in the bill of exceptions, and we think it appears from the testimony of the witness, William George, that he was an accomplice with Moran and Odell in the commission of the alleged crime. He says: "Moran went in and carried out the property named in the indictment, while he (the witness) and defend-

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ant Odell watched on the outside to see if any one was watching them." Such a participation in the commission of the crime would make him an accomplice. (1 *Bouvier Law Dictionary*, 52.) The term in its fullness includes in its meaning all persons who have been concerned in the commission of a crime, all *particeps criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (1 *Russell on Crimes*; 4 *Blackstone's Commentaries*, 331; 1 *Phillips' Ev.* 28.) It is sufficient that this should appear from the testimony of the accomplice himself, in order to enable the prisoner on trial to make the application of the rule that no conviction can be had on the evidence of an accomplice without corroborating testimony. The testimony of the other witnesses only tended to show that Odell was in the town about the time of the commission of the alleged crime, and that a sack of flour was missed from the place where the larceny was alleged to have been committed. Such evidence did not tend to connect the appellant with the commission of the crime. Such corroboration as tends to connect the accused with the commission of the crime is required by the statute (page 362, sec. 172) to render the testimony of an accomplice sufficient to warrant a conviction.

The circuit court should have given the instruction asked by the defendant's counsel, as follows: "A conviction of the defendant, Odell, can not be had upon the evidence of the accomplice, George, unless he be corroborated by other evidence tending to show the connection of defendant, Odell, with the commission of the crime alleged in the indictment, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances of the commission." The refusal of the circuit court to give this instruction as asked would have been error had not the court given the same in substance by reading the statute, which is of the same import, and we therefore think that the instruction was substantially given, and the refusal to give the instruction as asked did not injure the defendant.

Counsel for the prisoner also asked the court to give the

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following instruction: "The fact of the presence of the defendant Odell in the same town at the time of the commission of the offense, or immediately before or afterwards, is not sufficient evidence to connect the defendant Odell with the commission of the crime charged in the indictment." This instruction the court refused to give, and stated to the jury that it would be error for the court to give it, and said: "I am not permitted to state the evidence. You have heard it all, and of its effect and the credibility of witnesses you are the exclusive judges." The remark made to the jury by the learned judge announces a sound rule of the law. But does this instruction ask the court to state the evidence to the jury, the evidence adduced, or its effect? To illustrate: Had the counsel asked the court to instruct the jury that if they believed from the evidence that the prisoner was in the same town at the time of the commission of the crime, or immediately before or after, that fact alone would not be a sufficient corroboration of the evidence of the accomplice, George, to warrant a conviction. We think such an instruction was pertinent, and should have been given.

The instruction asked, taken in connection with the first instruction (which was given in substance), and the evidence reported in the bill of exceptions, which shows that the witness, James Fowler, testified that the prisoner was in the town about the time of the commission of the alleged crime, simply asked the court to declare that if such a fact was established, it alone would not be sufficient to connect the prisoner with the commission of the crime. We think the instruction should have been given, for it simply asked the court to say to the jury that as a matter of law, if there was no other evidence before the jury than the fact that Odell was in the vicinity, such evidence would not be sufficient to convict. While the court has not the right to tell the jury what facts have been proven, or declare to them the weight of the evidence adduced, so far as the credibility of the witnesses is concerned, still, when the statute has declared, as in section 172, that there shall be some other evidence of the commission of the crime and of the connection of the prisoner with it than the testimony of an accom-

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pliance, it was the duty of the court to say to the jury that the proof of the fact alone that the accused was in the town was not sufficient. The refusal of the court to give this instruction was error which must have injured the prisoner, for there was no other evidence to corroborate the testimony of George.

The judgment will be reversed, and the case remanded to the circuit court for a new trial.

**WILLIAM JOHNSON, RESPONDENT, v. THE OREGON
STEAM NAVIGATION COMPANY, APPELLANT.**

PLEADING—ALLEGATION OF OWNERSHIP IN ACTION FOR CONVERSION.—In an action for the wrongful conversion of personal property when the complaint contains no allegation that it was either the property of plaintiff or property in which he was interested, nor any allegation that it was wrongfully taken from his possession, it is not sufficient to sustain a judgment after verdict.

APPEAL from Clatsop County. The facts are stated in the opinion.

Wm. Strong & Sons, for appellant.

J. W. Robb and C. W. Fulton, for respondent.

By the Court, PRIM, J.:

This was an action to recover damages for an alleged wrongful carrying away of certain personal property described in the complaint. The action was originally commenced before a justice of the peace and appealed to the circuit court, where it was tried, and a judgment having been rendered against the appellant, an appeal has been taken to this court. The assignments of error are as follows:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in the admission of testimony.

The material parts of the complaint are as follows: "That said defendant, on or about the nineteenth day of July, 1878, by its agents and servants wrongfully carried away

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upon one of its steamboats from Fisherton, W. T., to Astoria, Oregon, one chest of the value of five dollars, and the articles contained in said chest. The description and value of said articles are as follows, to wit: Gold and currency one hundred and ten dollars, one overshirt of the value of three dollars, one red undershirt of the value of two dollars and fifty cents, one pair of flannel drawers of the value of two dollars and fifty cents, one pocket knife of the value of two dollars and fifty cents, amounting to the sum of one hundred and twenty-five dollars. That said plaintiff has demanded from said defendant said money and property, but said defendant has neglected and refused to deliver the same to plaintiff. That said plaintiff has been at great trouble and expense in tracing and searching for his said property, to wit, the sum of twenty-five dollars, and at the expense of employing attorneys to bring and prosecute this action, to wit, in the sum of twenty-five dollars."

The first assignment of error is well taken. The first cause of action is for wrongfully carrying away certain personal property from Fisherton to Astoria, but there is no allegation that it was either the property of the plaintiff or property in which he was in any way interested. Nor is there any allegation that it was wrongfully taken from the plaintiff. Possession will not be presumed to be unlawful until it is shown to be so. In fact, the possession of personal property is *prima facie* evidence of ownership in said property, either special or general. The latter part of the complaint contains this expression, "That said plaintiff has been at great trouble and expense in tracing and searching for *his said property*." This allegation has reference to property which had already been described, and the words "*his said property*" could not enlarge those allegations. It is also a well settled rule of pleading, that a pleading must be construed most strongly against the pleader. There being no cause of action stated in the complaint it was not a defect which was waived by answering or cured by verdict.

The judgment is reversed and the cause remanded to the court below for further proceedings.

Statement of Facts.

LUCIEN REMILLARD ET AL., APPELLANTS, *v.* C. H. PRESCOTT ET AL., RESPONDENTS.

MISTAKE IN DEED—GRANTOR.—In order to show a mistake in a deed, it must be shown that the grantor was a party to the mistake.

IDEM—DECREE OF PROOF.—In order to establish a mistake in a deed, it is necessary that the mistake be shown by clear and convincing proof, since the evidence must overcome the strong presumption existing in favor of written instruments, which should not be annulled by uncertain and contradictory testimony.

ESTOPPEL—PLEADING.—An estoppel, to be relied upon, must be pleaded where there is an opportunity to plead it.

APPEAL from Union County.

This is a suit in equity, originally brought by the appellants, Lucien and Edward Remillard, who claim to be the legal owners of an undivided half and equitable owners of the other half of lot No. 4, of block No. 1, in the town of Union, to compel the respondent Prescott to convey to them the undivided half of said lot 4. Prescott having subsequently begun an action to eject the appellants from lots 4 and 5, in said block, and the appellants having filed a cross-bill to enjoin said action, claiming an equitable defense as to lot 4 in both appellants, and as to lot 5 in the appellant Lucien Remillard, the two suits were, by order of the court, consolidated.

The facts alleged are in effect: That in the month of March, 1865, one A. C. Craig purchased of J. A. J. Chapman, respondent, lots 4 and 5, in block No. 1, in the town of Union, Union county, and went into the possession thereof; that thereafter, on March 3, 1865, no deed having been made by Chapman to Craig therefor, and Craig being absent from home, Prescott, acting for and in behalf of Craig, on his own motion, procured of Chapman a deed for said lots in fulfillment of said contract of purchase, but that by mistake, inadvertence, or at the solicitation of Prescott, said deed of conveyance was executed by Chapman to Prescott and Craig, when it should have been to Craig alone; that on —, 1872, Craig conveyed, for a valuable consideration, lot 4 to respondent E. Remillard,

8	37
8	198
21	181
27*	1045
8	37
24	490
34*	17
8	37
25	112
35*	37
8	37
28	274
8	37
42	260
42	611
8	37
45	482

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and E. Remillard conveyed the same to respondent L. Remillard, on —, 1874, and on May, 1877, L. Remillard reconveyed an undivided half thereof to said E. Remillard, and that they are now the owners thereof; that Craig, for a valuable consideration, conveyed lot 5 to E. S. McComas, and McComas conveyed to L. Remillard, who is now owner of the same; that appellants and their grantors have at all times since March 3, 1865, had full and undisturbed possession of said lots Nos. 4 and 5, and claimed title and had the exclusive use and occupation thereof, Prescott having full knowledge and information thereof; that Prescott advised and procured appellants and their grantors to purchase said lots from Craig, and acquiesced in the purchase and possession thereof, with full knowledge, and acquiesced in, and received large sums of money from appellants and their grantors for buildings and improvements put upon said lots with knowledge that appellants and their grantors claimed to be sole owners thereof; that appellants and grantors have paid all taxes thereon since 1865; that lot 4 is worth one thousand dollars, and lot 5 is worth two hundred dollars; that neither appellants nor their grantors had any knowledge that Prescott claimed any interest therein, or had any title thereto; that Prescott had knowledge of each of said conveyances at the time they were made, and made no objection thereto, and has been living in and near said town of Union ever since 1865 most of the time; that he has been advised of said mistake or misdescription in said deed, and requested to rectify it, but refuses to do so; that Prescott, on March, 1878, procured a deed from one Frederick Nodine and wife to said lots 4 and 5.

Prescott, by his separate answer, denies all the material allegations of the complaint, and sets up as a further defense that in 1863 Prescott and Craig purchased lots 4 and 5, and thereafter erected buildings thereon, and occupied the same as a saloon; that defendant Prescott paid to Craig four hundred and fifty dollars towards erecting said building, and that Chapman properly executed said deed of March 3, 1865, to Craig and Prescott, and that the said

Argument for Appellant.

deed was duly recorded in the county records; and for a further defense that Chapman was on March 1, 1865, largely indebted to Blaumer & Rosenblat, and that said Blaumer & Rosenblat sued Chapman, and attached said lots 4 and 5 on that day; that on the sixth day of March, 1865, Chapman gave a delivery bond for the property, and Nodine and Bennington were two of the sureties thereon; that Chapman, in consideration therefor, and of the release of said property from attachment, conveyed to them, Nodine and Bennington, said lots 4 and 5, with other property; that said Bennington deeded his interest to said Nodine, and said Nodine and wife to Prescott, in January, 1878, which deeds were duly recorded.

It is also alleged as master of estoppel against the appellants that Nodine, in the fall of 1867, published a notice calling on all persons to come forward on a day mentioned, and claim any right or title they might have in any of said lots, that he was going to have them sold at public sale; but that Craig did not make any claim to them, and that the same were sold to Nodine, and that Prescott claims title to the whole of said lots 4 and 5. The appellants filed a demurrer to the separate defense in the answer, setting up title in Prescott from Chapman through Nodine and Bennington, and setting up matter in estoppel. The demurrer was sustained as to the estoppel and overruled as to the other defense. Thereupon the appellants filed their reply, denying all the material allegations in the answer. Upon the trial the court found that there was no equity in the bill, and it was therefore dismissed. From that order this appeal is taken.

Baker & Eakin, for appellant:

Where a person undertakes to act for another and takes a conveyance in his own name which he undertook to obtain for another, equity will consider it a trust for his principal. (6 Paige's Ch. 355; Hill on Trustees, 144.) If A. purchase an estate with his own money, and the deed is taken in the name of B., a trust results to A., and may be proved by parol. (1 Johns. Ch. 582; 6 Paige's Ch. 355; 2 Johns. Ch.

Argument for Respondents.

405; Lomax Digest, 200; 4 Kent's Com. 306; 2 Story's Eq. Jur. 1201, note 2; 5 Barb. 51; 21 Ohio, 547; 16 Barb. 376; 6 Or. 204.)

Where the owner of real estate suffers another to purchase the estate from a third person, and erect valuable improvements thereon under the erroneous belief that he has a good title, and intentionally conceals his title from the purchaser, he is estopped from thereafter setting up his legal title. (3 Paige's Ch. 546; 1 Johns. Ch. 354; Bigelow on Estoppel, 508.) Even though his deed is recorded. (Bigelow on Estoppel, 466, 533; 46 Texas, 371; 12 Met. 494.) A sheriff acquires no possession or title to real estate by attachment. The attachment becomes only a lien; and if released before execution issues, it leaves the title unaffected. (5 Or. 46.)

Sterns & Balleray, and F. M. Ish, for respondents:

To establish a resulting trust in a case like this, it is necessary to show mistake on the part of the common grantor, and *mala fides* on the part of the person procuring the deed to himself. (Lewin on Trusts, 201; *Brown v. Kennedy*, 33 Beav. 133; *Phillipson v. Kerry*, 32 Beav. 544; Kerr on Fraud and Mistake, 429.) Or a mutual mistake of the parties. (1 Perry on Trusts, sec. 186, 217; *Andrews v. Essex Ins. Co.*, 3 Mason, 10; *Bradford v. Romney*, 30 Beav. 431.) The mistake if any, must also be clearly proved and put beyond cavil, as it operates to vary a written instrument. (*Holmes v. Constance*, 12 Ver. 279; *Gillespie v. Moon*, 2 Johns. Ch. 596; *Atty. General v. Sitwell*, 1 Young & Collyer, 583; *Tucker v. Madden*, 44 Maine, 206; *Hillman v. Wright*, 9 Ind. 126; *Linn v. Balkey*, 7 Ind. 69; *Ruffner v. McConnell*, 17 Ill. 212.)

Or there must have been fraud and circumvention of the common grantor Chapman by Prescott in obtaining the deed. If a resulting trust is to be established on account of fraud, the fraud must be alleged, and clearly, plainly, and specifically made out. Facts constituting fraud must be alleged. (*Harding v. Handy*, 11 Wheat. 103; *Conway v. Ellison*, 14 Ark. 360; *Pendleton v. Galloway*, 9 Ohio, 178; *Bell*

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v. Henderson, 6 How. Miss. 311; *Forey v. Clark*, 3 Wend. 637; Kerr on Fraud and Mistake, 365.) Fraud must be clearly and distinctly proved as alleged. (*Robson v. Earl of Devon*, 4 Jour. U. S. 248; *Jennings v. Broughton*, 17 Beav. 239; Kerr on Fraud and Mistake, p. 382-3; *Luff v. Lord*, 11 Jour., N. S. 50; *Parr v. Jewell*, 1 Kay and Johnson, 671; *Hill on Trustees*, 4 Am. ed. 264 and 265; *Miller v. Cotton*, 5 Ga. 346.)

Respondent insists that he is not estopped to assert his rights as against the appellants, for the reason that appellants had all the notice of respondents' title which the law requires to be given by the record of the deed, recorded March 4, 1865. (3 Washb. on Real Prop. 3 ed. 72 and 292; *Flynt v. Arnold*, 2 Met. 619, 625; *Hill v. Epley*, 31 Penn. St. 331; *Fisher's Ex'rs v. Mossman*, 11 Ohio St. 42; *Ferris v. Coover et al.*, 10 Cal. 589; *Davis v. Davis*, 26 Cal. 23.) A party to be estopped by a statement, must have misled the party claiming the estoppel, and such party must also have acted on the faith of it. (Bigelow on Estoppel, 492, note 4; *Garlinghouse v. Whitehouse*, 51 Barb. 208; Kerr on Fraud and Mistake, 132; *Dann v. Spurrier*, 7 Ver. 230; 4 E. D. Smith, N. Y. 296; 3 Wash. R. 75.) And the statements claimed as working on estoppel must have been exclusively acted on, and the party must have been justifiable in so exclusively acting on them. (Bigelow on Estoppel, 493; *McMaster v. Ins. Co. of N. A.*, 55 N. Y. 222.)

Matter out of which an estoppel arises must be clearly proved. (*Prebel v. Conyer*, 66 Ill. 370; *Davis v. Davis*, 26 Cal. 23.) An estoppel, also, when relied on and there is an opportunity to plead it, must be pleaded. (*Brinkerhoof v. Lansing*, 4 Johns. Ch. 70; *Arguello v. Edinger*, 10 Cal. 150; *Downer v. Smith*, 24 Cal. 114; *Blum v. Robertson*, 24 Cal. 127; *Clark v. Huber*, 25 Cal. 593; *Flandreau v. Downey*, 23 Cal. 354.)

By the Court, BOISE, J.:

The appellants claim that their demurrer to that part of the answer of the respondent Prescott which sets up a conveyance of the property from Chapman to Nodine and

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Bennington, and from them through mesne conveyances to Prescott, should be sustained. As this conveyance from Chapman to Nodine and Bennington was made after the deed from Chapman to Craig and Prescott, we think there is no question but what this part of the answer constitutes no defense, and that the demurrer is well taken, so that Prescott has by the pleadings no further interest in the property in dispute than that which he holds under the deed from Chapman to Craig and himself, which is an undivided half interest.

We will now consider Prescott's interest under this last named deed. The appellants allege that in March, 1865, A. C. Craig purchased these lots of J. A. J. Chapman; that thereafter, no deed having been made by Chapman to Craig therefor, and Craig being absent from home, "defendant Prescott, acting for and in behalf of Craig," on his own motion, procured of respondent Chapman a deed for said lots in fulfillment of said contract of purchase. But "by mistake, inadvertence, or at the solicitation of defendant Prescott, said deed of conveyance was executed by said Chapman to said Prescott and Craig when it should have been to Craig alone." These allegations are denied and the determination of the case must rest on the discussion of these issues of fact.

It is alleged that the name of Prescott was inserted in the deed by mistake. Craig, who is a witness for the appellant, testified in relation to his purchase of the lots from Chapman that he was to have the lots for improving them. This improvement commenced in February, 1864. He then put up a building in the spring of 1864, twenty by twenty-six feet. There was no particular understanding what the improvements were to be. He then put up an addition, making the building forty feet in length, with a small kitchen attached. He states also that he paid the taxes on the property until he sold it, and collected the rents, and that he was in sole possession. He is corroborated as to the possession and receiving the rents by the appellants, and other witnesses of the appellants. Prescott testifies that the lots were deeded to himself and Craig by Chapman in

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consideration of their improvement, Chapman, who was the proprietor of the town of Union, being desirous to have these improvements made to build up the town, and thereby enhance the value of his adjoining property; that no consideration was paid for them except one or two dollars which he paid; that he helped Craig to put the improvements on the lots; that he negotiated with Chapman for lot five, and had an understanding with Craig that they were to improve and own the lots in common; and that fearing that Chapman's property would be attached, he procured the deed and had it recorded. Craig and Chapman are the only witnesses who have personal knowledge as to their understanding of the ownership of the property when the deed was executed. Prescott is the only witness who knows whether or not there was a mistake made by Chapman in executing the deed to Craig and Prescott instead of to Prescott alone, and he testifies that the deed was executed by Chapman to himself and Craig according to Chapman's, Craig's, and his understanding at the time; and that they, Prescott and Craig, were to have the lots in common for improving them.

We think from this evidence that it is not proven that the grantor Chapman, made a mistake as alleged when he executed the deed. In order to show a mistake, it should be shown that Chapman, the grantor, was a party to it. (Lewin on Trusts, 201; 33 Beav. 133; Kerr on Fraud and Mistake, 429; 1 Perry on Trusts, 217.) In order to establish a mistake in a deed it is necessary to show it by clear and convincing proof, as the evidence must overcome the strong presumption which exists in favor of written instruments, which should not be annulled by uncertain and contradictory testimony. (*Gillespie v. Moon*, 2 Johnson's Ch. 279; *Hillman v. Wright*, 9 Ind. 126.)

The next question is, did Prescott obtain this deed by fraud? On this subject the testimony is conflicting; Craig and Prescott being the only witnesses who have any personal knowledge, and they disagree. There is some evidence of the acts and declarations of Prescott which tend to corroborate the testimony of Craig, that he alone was to have the

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deed. He seems to have had the control of the property after the deed was made, except while he and Prescott occupied it as a saloon. There is on the other hand the fact that Craig, knowing that the deed was made to Prescott and himself, made no effort to get the whole title, and when he sold the property made a quitclaim deed to it, granting simply his right in the premises. He and Prescott were also, at the time the deed was made, partners in business, and in circumstances where they would be likely to embark together in such an enterprise. And there is also the fact that Prescott was at the pains to obtain the deed and paid the nominal consideration therefor.

From the whole evidence we think the fact of fraud in obtaining the deed is not clearly established, and that we would not be warranted in finding that the deed was obtained from Chapman by fraud, and that to do so on the evidence before us would be going beyond the rules established in any of the numerous cases cited by counsel.

The only remaining question is as to the estoppel. The appellants claim title by estoppel, and if they intended to rely on such title, they should have pleaded it in the complaint, as they had an opportunity to do so. They made their case in the complaint, wherein they relied on the fact that Craig had purchased the property from Chapman and that by mistake on the procurement of Prescott the deed was made to Prescott and Craig. We think, therefore, that the matter of estoppel as sustaining the claim of the appellant as prayed for can not be considered in the case.

There were some other questions which were discussed to some extent in the argument which are not pertinent to the issues as made by the pleadings, and it is not necessary to consider them here.

We do not find any error in the findings or determination of the circuit court, and its decree will be affirmed by this court with costs.

Opinion of the Court—PRIM, J.

JOHN PAGE ET AL., RESPONDENTS, v. HENRY FINLEY
ET AL., APPELLANTS.

IMPEACHING WITNESS—GENERAL REPUTATION.—The regular mode of examining into the general reputation is to inquire of the witness first whether he knew the *general* reputation of the person in question among his neighbors, and if his answer is in the affirmative, then he may be asked what that reputation is.

INSTRUCTION—MATTERS NOT PERTINENT.—The mere omission to instruct upon matters pertinent to the case is not error, without the attention of the court is called to the matter.

APPEAL from Polk County. The facts are stated in the opinion.

Knight & Lord, for appellants.

Ben. Hayden, and Wm. H. Holmes, for respondents.

By the Court, PRIM, J.:

This is an appeal from a judgment in an action for damages, for the malicious utterance of defamatory words. The complaint in brief alleges that on the sixth and seventh days of June, 1878, in the county of Polk and state of Oregon, the appellant, Elizabeth Finley, maliciously and falsely accused the respondent, Eva Page, of the crime of adultery, committed with one W. R. Ross and one Sel Finley. The answer denies the allegations of the complaint; and in their separate answer, the appellants justify by alleging that the appellant, Elizabeth Finley, in June, 1878, in the county of Polk and state of Oregon, caught the said Eva Page and the said Ross in the act of adultery; and in mitigation of damages allege the lewd acts and unchaste conduct of the said Eva Page at different times with the said Sel Finley and other persons; and further allege that the words were spoken in their own house, and nowhere else, in a conversation addressed to the said Elizabeth Finley by the said John Page and the said Ross, concerning the chastity of the said Eva Page, in the presence and hearing only of the parties to this action and the said Ross, and were spoken with no intention to injure or defame the said Eva Page.

8	45
9	469
9	470
10	395
15	283
14*	747
8	45
36	207
8	45
87	89
8	45
147	490

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The allegations of the separate answer were put in issue by stipulation of the parties without replication.

The bill of exceptions shows that at the trial the defendants introduced the testimony of several witness tending to prove that the plaintiff, Eva Page, was a lewd and unchaste woman. After the defendants had rested their case, the plaintiffs then called the following witnesses for the purpose of proving that the general reputation of the plaintiff, Eva Page, for chastity, was good.

Mr. Stevens, who testified that he knew the plaintiff, Eva Page, intimately, and had so known her since 1875, but that she had not lived in his immediate neighborhood since that year. The counsel for the plaintiffs then asked the witness the following question: "What is her reputation for chastity in your neighborhood?" To that question the counsel for the defendants objected, for the reason it had not been shown by the previous testimony of the witness that he knew what her *general* reputation for chastity was, and was therefore incompetent to testify on that subject. The court overruled the objection, and the defendants, by their counsel, duly excepted, and the exception was allowed by the court.

The same interrogatory was put to several other witnesses, to which they replied to the same effect. Exceptions were then and there duly taken and allowed by the court. The admission of the testimony of these witnesses is assigned as error, for the reason that they had not been asked, nor had they testified that they *knew* what the *general* reputation of the person in question, for chastity, was. This assignment we think is well taken. While it has been held in some cases that the preliminary questions as to the knowledge of the reputation need not be put, we think the point has been settled the other way by the later and better authorities. Mr. Greenleaf says: "The regular mode of examining into the general reputation is to inquire of the witness whether he *knows* the *general* reputation of the person in question among his neighbors, and what that reputation is." (1 Greenleaf on Evidence, sec. 461.) Thus it will be seen that the question excepted to is objectionable in two particulars:

Points decided.

1. The witnesses were asked what the reputation of the party, for chastity, was, without first being asked whether they knew what that reputation was. 2. They were asked as to her reputation instead of her *general* reputation among her neighbors.

The next alleged error is as to the ninth instruction upon the question of damages. It is claimed that the court erred in failing to give to the jury any definite rule as to the measure of damages. If appellants desired special instructions upon that subject they should have presented such instructions as they desired with a request that they be submitted to the consideration of the jury. Then a refusal to instruct as requested could have been assigned as error. This assignment we think is not well taken.

The next assignment of error complained of is as to the instructions given at the request of the respondents, as follows: "The character of evidence to prove the justification must be such as would warrant them (the jury) in convicting of the crime charged." This instruction refers to the quality and not to the quantity or degree of evidence necessary to prove the justification, and is therefore not objectionable. It would have been better perhaps to have used language more definite in its meaning.

The court having erred in admitting the witnesses to testify as to reputation as alleged in the first assignment, the judgment should be reversed, and the case remanded to the court below for a new trial.

JOSEPH E. BENTLEY ET AL., APPELLANTS, *v.* REBECCA F. JONES ET AL., RESPONDENTS.

APPEAL—EXECUTION—MAY BE RECALLED, WHEN.—When an appeal has been taken from a judgment and undertaking given for a stay of proceedings, an execution issued thereon may be recalled and set aside by the circuit court on motion.

IDEM—EVIDENCE NOT PRODUCED IN LOWER COURT.—No paper or other evidence not produced at the hearing of the motion in the circuit court can be considered by the appellate court.

APPEAL from Linn County. The facts are stated in the opinion.

Opinion of the Court—PRIM, J.

S. A. Johns and T. P. Hackleman, for appellants.

J. K. Weatherford and N. B. Humphreys, for respondents.

By the Court, PRIM, J.:

This is a motion by respondents before Judge Harding, at chambers, to set aside an execution issued on a judgment in favor of appellants and against respondents for one dollar damages, and for two hundred and thirteen dollars and eighty cents, costs and disbursements, for the reason that an appeal had been taken to the supreme court by respondents, whereby proceedings were stayed as provided by law. The motion was heard in term time, and allowed, and an order made setting aside the execution, and for costs and disbursements. From this order and judgment an appeal has been taken to this court.

On looking into the transcript it will be seen that the motion was based upon the affidavit of John C. Elder, one of the respondents. The order setting aside the execution, it appears was based upon that affidavit, as the record fails to show that any other paper was produced by either side. Appellants having failed, on the hearing of the motion, to controvert the facts stated in the motion and affidavit upon which it was based, they were and should have been treated as true. The material provisions of the undertaking on appeal as set out in said affidavit, were sufficient, if true, to sustain the motion. If not properly set out therein, they should have been controverted by the other side, by counter affidavits or by producing a certified copy of the original undertaking on file. Respondents having failed to avail themselves of this privilege at the hearing of the motion, the court very properly held that the execution had been improperly issued and should be recalled.

But it appears that the original undertaking filed on the appeal has been sent up with the transcript to this court, and upon inspection it will be seen that its provisions were insufficient to operate as a stay of execution. It is claimed, however, that this paper is improperly here and should not be considered by this court. This position we are of opin-

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ion is correct. This paper properly belongs to the files in the original case, and has no connection whatever with the transcript in this proceeding unless produced in evidence at the hearing, and if produced in evidence, a certified copy should have been used instead of the original. But there being no bill of exceptions nor anything in the record indicating that it was used in the court below, it can not be used here.

The judgment of the court below is affirmed with costs.

BRIDGET NINE, APPELLANT, v. LEWIS M. STARR,
RESPONDENT.

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78

BASTARD CHILD—AGREEMENT FOR SUPPORT—CONSIDERATION FOR.—Where the putative father of a bastard child agrees with the mother that he will pay her for boarding and clothing such child, such contract is without consideration, and cannot be legally enforced. The mother of such child is its guardian and bound to maintain it.

ITEM.—A moral obligation unsupported by any pre-existing legal obligation is not a sufficient consideration to support an express contract that can be enforced at law.

APPEAL from Multnomah County.

This is an action to recover upon an express contract for the maintenance of the infant illegitimate son of the parties. The appellant alleges that in August, 1867, she gave birth to an illegitimate child, of which the respondent is the natural father; that at that time and prior thereto the appellant and respondent cohabited together but were not married, and that they so continued until July, 1868, when she informed the respondent of her determination to withdraw from the unlawful association with him, which she then did; that thereupon he requested her to keep, support, clothe, and educate the child, and provide medical attention for it when necessary, and to continue such support and care for nine or ten months, or until the respondent could make arrangements to take it for himself and send it to his sister in California, where he intended to have it kept and raised; that he promised to pay therefor so much as the ser-

Opinion of the Court—Boise, J.

vices were reasonably worth, and all expenses necessarily incurred by the appellant in caring for the child; that in consideration of these promises she kept and cared for the child, and paid out for medical treatment and medicines for it six hundred dollars; and that her services and other necessary expenditures for the child are reasonably worth seven thousand dollars.

To this complaint a demurrer was filed, which was sustained by the court, and the respondent had judgment for his costs and disbursements. From this judgment this appeal is taken.

Yocom & Clarno, for appellant.

Dolph, Bronaugh, Dolph & Simon, for respondent.

By the Court, Boise, J.:

The first question arising on the demurrer in this action is as to the sufficiency of the allegations of the complaint to constitute a cause of action. The contract relied on is an agreement made by the alleged father of a bastard child with the mother, whereby he agreed to pay her for its maintenance. It is claimed by the respondent that this alleged agreement is without consideration and void, for the reason that the putative father of a bastard child is not legally bound to support it, but that this obligation legally devolves on the mother. We think that whatever the moral obligation of a putative father may be to support such a child, no legal obligation attaches to him in that behalf, and that this legal obligation is upon the mother. *Tyler on Infancy and Coverture* (p. 285), lays down the rule that the mother is the natural guardian of such a child, and is bound to maintain it, and we think such is the law. When one agrees to pay another for a service which that other is legally bound to perform, the contract is without consideration, and can not be enforced. (*Parsons on Contracts*, 424.)

It may be truly said that the respondent was under a moral obligation to contribute to the support of this illegitimate child, and it is insisted that this is a sufficient consideration to support this promise. But to constitute a moral

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obligation the consideration of an express contract which may be enforced by an action at law, there must have been some pre-existing legal obligation. This legal obligation may have ceased to have force by reason of the statute of limitations, or the like; but there having been a legal obligation, the moral obligation is sufficient to revive the liability by means of an express promise. (*Mills v. Wyman*, 3 Pick. 207; *Dodge v. Adams*, 19 Pick. 429; *Cook v. Brady*, 7 Conn. 57.)

We think, therefore, that the alleged promise of Starr to pay the appellant for the maintenance of this child can not be enforced at law, and that the judgment of the circuit court must be sustained.

The other points in the demurrer are therefore immaterial.

THE GRANGE UNION, APPELLANT, v. H. D. BURKHART.

FINAL SETTLEMENT OF ESTATE—REJECTED CLAIM.—Where one having a claim against the estate of a deceased person presented it to the administrator for allowance, and it was rejected by him, and no action was afterwards commenced by the claimant against the administrator to establish its validity, the holder thereof can not after the final settlement of the administration accounts maintain a suit in equity to recover the claim from the next of kin of the deceased person out of any distributive share which he may have received.

APPEAL from Linn County. The facts are stated in the opinion.

Powell & Flynn, and R. S. Strahan, for appellant.

J. K. Weatherford and D. R. N. Blackburn, for respondent.

By the Court, KELLY, C. J.:

The respondent is a corporation duly incorporated under the laws of Oregon, on the sixth day of February, 1875, with a capital stock of twenty thousand dollars, divided into eight hundred shares of twenty-five dollars each. In April of that year subscriptions were made to the capital stock,

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and among others, one by L. C. Burkhart, for four shares, amounting to one hundred dollars. The whole amount was levied and ordered to be paid on or before October 30, 1875. The assessments of L. C. Burkhart became due and payable but were not paid by him. On the fifth day of November, 1875, he died intestate, leaving H. D. Burkhart, the appellant, and six others, his heirs at law. In November, 1875, the appellant was appointed administrator of the estate of his father, and as such administrator he settled up the estate on the eleventh of March, 1878. The appellant received out of the personal estate of L. C. Burkhart, deceased, four hundred and thirty-five dollars and seventy-six cents as his distributive share of the estate as one of the heirs and next of kin.

The respondent made out a claim against the estate of the decedent for one hundred dollars and interest, the amount of the assessments before referred to, duly verified, and presented the same to the administrator for allowance about six months before the settlement of the estate. The administrator neither allowed nor disallowed the claim by indorsement thereon at the time it was presented, but two or three months before the final settlement of the estate, the administrator personally notified the respondent, through its secretary, that he would not pay said claim. The secretary, who had charge of the matter, informed the administrator that he would appear before the probate court and object to the final settlement of the estate unless the claim was paid. The administrator stated that he was ready to pay it if the court would so direct. The respondent, however, failed to appear, and made no objections whatever to the final settlement. After the discharge of the appellant as administrator, this suit was brought against him as next of kin of L. C. Burkhart, deceased, to enforce the payment of the claim of one hundred dollars and interest, before referred to. It is brought under section 469, page 206, of the code, which is as follows: "The next of kin of a deceased person are liable to a suit in equity by a creditor of the estate to recover the distributive shares received out of such estate, or to so much thereof as may be necessary to

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satisfy his debt. The suit may be against all of the next of kin jointly, or against any one or more of them severally."

The claim for the recovery for which this suit was brought, was presented by the respondent to the administrator of L. C. Burkhart, deceased, for his allowance or rejection, and afterwards disallowed by him, of which fact he afterwards personally notified the secretary of the respondent. When the claim was rejected, we think the respondent ought to have proceeded to establish its validity by an action against the administrator, so that any judgment which might have been obtained could have been satisfied in the due course of administration. The respondent had a plain and adequate remedy at law to collect its demands, and having discontinued the proceedings already commenced to establish the claim, the administrator was justified in coming to the conclusion that it had been abandoned. Under these circumstances, after the final settlement of the administration accounts, we think the respondent ought not to maintain a suit in equity to establish its claim against the appellant as the next of kin to the decedent, L. C. Burkhart.

The decree of the circuit court is reversed, and it is ordered and decreed that the appellant recover of the respondent his costs of suit.

**JAMES ABRAHAM, APPELLANT, *v.* GEORGE ABBOTT,
RESPONDENT.**

CONVEYANCE—RESERVATION IN A DEED.—Where a person owning a tract of land sells a portion thereof which is surrounded by his other lands, and describes the lands conveyed by metes and bounds, and then excepts a strip included in these bounds off of three sides of the land so described, for a road; held, that the fee passes by the deed subject to the right of way for a road.

APPEAL from Multnomah County.

This is an action in ejectment. The appellant heretofore conveyed to the respondent a tract of land by the following instrument:

Opinion of the Court—Boise, J.

"I have this day bargained and sold unto the said Annette Abbott the following described real estate, to wit: Commencing at the north-east corner of the Seldon Murray Donation Land Claim, running thence twenty chains west to a stake; thence twelve chains south to a stake, to the initial point of this description to a stake; thence west five chains to a stake; thence south eight chains to a stake; thence east five chains to a stake; thence north eight chains to the said initial point of this description, except a strip off of the north and west sides thereof thirty feet wide, and a strip off of the east side thereof twenty feet wide, reserved for a road. Said tract so sold containing four acres, less said reserved strips, being, lying, situated," etc.

The appellant contends that the strips described in the instrument are excepted from the grant, and this is the question to be determined in the case. The land by which the tract described in the instrument is surrounded belongs to the appellant, and has been by him laid off in two acre tracts with streets—the strips in question being a part of these streets. The court below held that the strips passed by the conveyance to the respondent with a reservation of the right to use them for a road, and the respondent had judgment accordingly, from which this appeal is taken.

Wm. Strong & Sons, and M. C. George, for appellant.

Thayer & Williams, for respondent.

By the Court, BOISE, J.:

The question to be decided in this case arises on the construction of the deed set out in the statement of the case. The grantor in this deed being the owner of the land surrounding the tract described in the deed, if he did not intend to grant any interest in these strips will not be presumed to have included them in the deed for the mere purpose of reserving them, if any other reasonable construction can be given to the language of the instrument. Reservations usually impose some burden or easement on the land conveyed, as a right of way or the like. In this case we think the manifest intention of the grantor was to convey

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to the grantee the entire tract of land described in the deed with the reservation of the right for a road over these strips.

The language "except a strip off of the north and west sides thereof thirty feet wide, and a strip off of the east side thereof twenty feet wide, reserved for a road," we think was used by the parties for the purpose of reserving these strips for a road alone; and such is the natural meaning of the words. Such a construction will give effect to the grant over all the property described, and afford a reason for including these strips in the deed, otherwise we can see no reason why the grantor should have included these strips in the description of the land. The circumstances surrounding the transaction show a reason for such a construction. For as the grantee was buying land surrounded by other lands of the grantor, it would be for his interest to secure land for roads on all sides of him, and especially as this land was near the city of Portland and might soon be needed for suburban lots. And the same would be true of the grantor, for he also might want streets on these strips. The width of the strips would indicate that it was the intention of the parties that this land sold should extend to the center of the contemplated streets, subject to this right for a road, and if the road was the usual width—sixty feet—each adjoining proprietor would own to the center. If we were to give the deed the construction contended for by the appellant, we could give no meaning to the words "for a road." We think the other is the more reasonable construction and the one which the parties intended at the time the deed was made.

The decree of the circuit court dismissing the plaintiff's bill will be affirmed with costs.

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LOUIS NICOLAI, RESPONDENT, v. S. M. LYON, APPELLANT.

COMPOSITION AGREEMENT—EFFECT OF, AS TO LIABILITY OF THIRD PERSONS.—L., a broker, undertook to loan money for N. for compensation, upon first-mortgage security; but through negligence loaned the money on second-mortgage security, and thereby became liable to N. to make good the security. Before the loan became due N. signed a composition agreement with other creditors of the borrower, releasing such borrower from personal liability beyond the lien of the mortgage. *Held*, that the release of the borrower by it had the effect to release L., the broker, from his contingent liability to N.

PLEADING—AN ALLEGATION OF FRAUD, to be sufficient, must state facts which show that the party complaining was misled and injured by the matter complained of.

COMPOSITION AGREEMENT—NOTICE PRESUMED AS TO CONDITION OF PROPERTY ASSIGNED.—Where a composition agreement was signed in which it was stipulated that the creditors did not waive any lien either of them had upon the property assigned by the agreement, it was *held*, that the creditors were presumed to have inquired as to the condition of the property and the liens to which it was subject, and that to avoid such agreement it must appear that active fraud was practiced upon such creditors.

APPEAL from Multnomah County.

It is alleged on behalf of the respondent that in March, 1873, the appellant undertook with the respondent for compensation to loan two thousand dollars for the respondent upon adequate first-mortgage security; that he negligently loaned the money to J. B. and C. B. Upton, upon the security of a second mortgage on certain real estate in East Portland; that there was a prior unpaid mortgage of record upon the property taken; that the property so mortgaged was sold, upon foreclosure of the first mortgage, for no more than enough to satisfy such first mortgage; that the Uptons have been insolvent ever since the respondent's debt became due; that no part of the two thousand dollars has been paid. Among other defenses it is alleged that the respondent and other creditors, without the appellant's knowledge, entered into composition agreement with the Uptons in August, 1873, by which it was agreed that in consideration of the assignment to G. A. Steel, for the creditor's benefit, of certain property by the Uptons, the creditors

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would release the Uptons from all personal liability on account of their indebtedness to such creditors; that it was stipulated in the agreement that the creditors did not waive any liens either of them had upon any of the property assigned. The respondent seeks to avoid the effect of the signing of this composition agreement upon the ground that the Uptons did not assign to the assignee of the creditors a promissory note which they held against A. C. Gibbs, and which was included in the composition agreement; that at the time the agreement was signed this note was deposited with the First National Bank of Portland, as security for a debt due from the Uptons to the bank, of which fact the Uptons did not inform the respondent. The bank signed the composition agreement with the other creditors. Upon the trial in the court below, the court, among other instructions, gave the following:

“If the plaintiff was induced to sign the composition agreement by fraudulent representations or fraudulent concealments, upon the part of the Uptons, then it was void as between the Uptons and plaintiff.”

“If it was void as between plaintiff and the Uptons, then the signing of the composition deed by plaintiff, constituted no defense to the defendant in this action.”

“The composition deed is a representation that the Uptons were the owners of the Gibbs note, and had a right to make a good and sufficient transfer of the same to the assignee, for the use and benefit of the creditors; and if untrue at the time, and known to be untrue by the Uptons, was a fraud upon every creditor who signed the composition deed without knowledge of the truth, and rendered it void as to them.”

The appellant’s counsel asked the following instruction, which was refused:

“If the jury find from the evidence that at the time of the signing of the composition agreement by Nicolai, the Uptons were the owners of the Gibbs note mentioned in the pleadings, but that said note was pledged to the bank as collateral security for a debt due from the Uptons to the bank, and that the bank also signed said composition agree-

Opinion of the Court—Boise, J.

ment, and that thereafter, and within the time specified in said agreement, the Uptons assigned to G. A. Steel all their interest in said note by proper conveyance, then the Uptons fulfilled their part of said composition agreement so far as said note is concerned."

The respondent had judgment on a verdict of the jury for two thousand dollars, the amount prayed for. From this judgment this appeal is taken.

Dolph, Bronaugh, Dolph & Simon, for appellant.

Catlin & Killen, and Wm. Strong, for respondent.

By the Court, BOISE, J.:

This case has been before this court on a former appeal by the appellants, and in that appeal some of the questions now presented were heard and considered by the court. (6 Or. 457.) On that appeal it was held by this court that the fact that Lyon signed the composition deed would not operate to relieve the Uptons from any contingent liability they might be under to Lyon, provided Nicolai shall recover against him on the contract named in the complaint, arising out of his failure to loan the two thousand dollars on a first mortgage; and that the signing of the composition agreement by Nicolai released Lyon from his liability to Nicolai. The decision of the court in that appeal would be binding on us as authority in determining this appeal, were it not that it is now claimed that the composition agreement was not binding on Nicolai, for the reason that it was fraudulent; that, as alleged in the replication, "said composition agreement was never valid or binding on respondent, because at the time of its execution said Uptons were not the owners of said Gibbs' note, and did not inform plaintiff of that fact, of which he was ignorant." We do not think this is a sufficient allegation of fraud. (*Horrell v. Manning*, 6 Or. 416; *Rolf v. Russell*, 5 Id. 400; *Dubois v. Hermance*, 56 N. Y. 673; *Liffen v. Field*, 52 Id. 621.) Moreover, to avoid the agreement on this ground, it should appear that the respondent was misled by this fact, and thereby induced to execute the agreement.

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The evidence also tends to show that at the time that Nicolai signed the agreement the Gibbs note was pledged at the First National Bank, to secure notes of the Uptons, and that the Uptons were the owners of it. If such was the fact, then the note was the property of the Uptons, subject to the lien, and was one of the portions of the property of the Uptons, named in the composition agreement, which was reserved to the lienholder by the express terms of the agreement—as much so as the property subject to the mortgage held by Nicolai; for it appears from the agreement itself that the parties thereto stipulate and say in relation to these liens, “not hereby waiving any lien that any of or either of us have upon said property or any part thereof.” The First National Bank was a party to the agreement as well as Nicolai. Nicolai should have then inquired as to the liens which are referred to, and will be presumed to have done so, unless some active fraud is shown to have been practiced on him by which the condition of this note was concealed from him. On this subject the counsel for the appellant asked the court to instruct the jury that: “If the jury believe from the evidence that at the time of the signing of the composition agreement by Nicolai the Uptons were the owners of the Gibbs note mentioned in the pleadings, but that said note was pledged to the bank as collateral security for a debt due from the Uptons to the bank, and that the bank also signed the composition agreement, and that thereafter and within the time specified in said agreement the Uptons assigned to G. A. Steel all their interest in said note by proper conveyance, then the Uptons fulfilled their part of the composition agreement so far as said note is concerned.”

We think, for the reasons before stated, that this instruction should have been given, and that the refusal of the court to give it was error, for which the judgment of the circuit court should be reversed and a new trial ordered.

Opinion of the Court—Prim, J.

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E. C. DICE, RESPONDENT, v. WILLAMETTE TRANSPORTATION AND LOCKS COMPANY, APPELLANT.

NEGLIGENCE—PASSENGER MAY LAND AT INTERMEDIATE POINTS.—A passenger for hire, traveling upon a steamboat, has a right to go ashore at any point where such boat may land, before arriving at his destination, without forfeiting his rights as a passenger to safe ingress and egress.

APPEAL from Marion County. The facts are stated in the opinion.

Hill, Durham & Thompson, for appellant.

Ben Hayden, Knight & Lord, for respondent.

By the Court, PRIM, J.:

This action was brought to recover damages for injuries sustained, as is alleged, through the negligence of the agents and servants of the appellant. The appellant was a corporation and the owner and proprietor of a steamboat named the "Occident," which was employed by the appellant in conveying passengers and merchandise on the Willamette river, from Portland to Independence, Oregon, for hire; and was also the owner and proprietor of a wharf at the foot of Trade street, in the city of Salem, Oregon. The appellant received the respondent into its said boat for the purpose of carrying him safely therein as a passenger from Portland to Independence, Oregon, for the usual fare. That before reaching Independence the appellant stopped its said boat at its wharf in the city of Salem, on the night of the seventh day of December, for the purpose of discharging its freight and passengers. That while it was so stopped and employed in landing its passengers, the respondent, having occasion to go ashore on business, in passing from said boat to the wharf stepped off the boat and fell, breaking his right arm and sustaining other injuries. That the night was dark and rainy, and there were no lights on the boat and wharf, or none sufficient to enable the respondent to see plainly his way ashore. The respondent was without blame, unless going ashore at that place without permission of the appellant shall be considered such.

Opinion of the Court—Prim, J.

A judgment was recovered against the appellant in the court below, from which an appeal is taken to this court.

The theory of the appellant is that respondent having employed the company to carry him safely from Portland to Independence, should have remained on the boat without going ashore at any intermediate point until the boat reached his place of destination. That when its boat stopped at its wharf at Salem for the purpose of discharging its freight and passengers, it was not obliged to furnish the respondent a safe means of egress from its boat to its wharf, although he may have had business ashore at that point; that his attempt to go ashore there was at his own risk, and that the appellant was not responsible for any injury that may have resulted to him in consequence of the accident.

At the trial of the case the court was requested by the appellant to instruct the jury as follows: "If you find that the plaintiff took passage on the defendant's boat at Portland for the town of Independence, and that he attempted to land at a way port without the permission of the defendant, then in so doing he was not a passenger, but took upon himself the risk of receiving injury in landing from and returning to the boat, and he can not recover in this action unless you find such negligence on the part of the defendant as would render it liable to a person not a passenger." The refusal of this instruction is the principal ground of error complained of by the appellant.

To sustain this proposition the appellant cites the case of *State v. Grand Trunk Railway Company of Canada*, 58 Maine, 176. While the syllabus of that case sustains the proposition, the facts of the case are not at all analogous to the one under consideration. That was a criminal case, and the indictment charged the company with negligently and carelessly running their locomotive against one Pullen, by means whereof he was killed. He had purchased a ticket at Auburn for Portland. The train turned out on the side track at an intermediate point to await the express train from Portland, which was behind time. The deceased got off the car while it was standing there, crossed the main track and

Opinion of the Court—Prim, J.

went behind the water tank for a necessary purpose. While there the express train signaled its approach and the conductor of the waiting train gave the usual notice for passengers to resume their seats, which the deceased did not hear, but did hear the double whistle, and thereupon rushed from behind the water tank, but not seeing the approaching train on account of the intervening water tank, undertook to recross the main track, when he was struck by the engine of the express train and so injured that he died in a few hours. Thus it will be seen that the train had not stopped at a depot for the purpose of discharging its passengers, nor was the deceased injured on account of the means of egress and ingress to the car being in any way defective and unsafe, nor does it appear that there was any negligence on the part of the agents and servants of the company. If the respondent in the case had been injured by another boat running against him after he had safely reached the wharf it would have been an analogous case.

A case is cited on the other side in 51 Georgia, which appears to be in point. (*The Montgomery and West Point Railroad Company v. Jesse Baring*, 51 Ga. 582.) One Baring took passage on the road of said company at Columbus, Georgia, to be carried to West Point, Georgia, for the usual fare. The train was stopped on the track at an intermediate point from half an hour to an hour in the night time, to await the arrival of another train of the company, to convey its passengers to its destination. The train stopped over an open ditch six or eight feet deep, at the bottom of which there were rocks and timbers, which ditch was known to the conductor but unknown to the passengers. There were no stationary lights by which it could be seen by him. While the train was standing there the passenger stepped out of the car, and was precipitated into the ditch and had his leg broken and was crippled for life. In that case, it was held by the court that he had the right under the circumstances to step out of the car, and that the company was liable for damages for the injuries resulting to him, on the ground of negligence.

Under the facts and circumstances of the case under con-

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sideration we are of opinion that the respondent had the right to go ashore at Salem, and that appellant was obliged, through its agents and servants, to provide him a safe means of egress from the boat to its wharf. It follows from this conclusion that it was not error to refuse the instruction requested.

The judgment is affirmed, with costs.

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34*	477
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**COLIN MCRAE, APPELLANT, v. V. S. DAVINER ET AL.,
RESPONDENTS.**

A PURCHASE AT AN EXECUTION SALE by a sheriff, depends upon the judgment, the levy, and deed. All other questions are between the parties to the judgment and the sheriff.

SHERIFF'S SALE—ORDER OF CONFIRMATION CONCLUSIVE OF REGULARITY OF SALE.—By sec. 293, subd. 4, of the code, an order confirming a sheriff's sale is a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit, or proceeding whatever.

APPEAL from Union County. The facts are stated in the opinion.

M. Baker and R. Eakin, for appellant.

L. O. Sterns, John J. Balleray and F. M. Ish, for respondents.

By the Court, PRIM, J.:

This suit was commenced in equity to set aside a sheriff's sale of real estate, made under and by virtue of an execution, and is based upon the following facts: On October 21, 1876, V. S. Daviner, one of the respondents, recovered a judgment against the appellant, in the circuit court of the state of Oregon for the county of Union, for the sum of two thousand and fifty-five dollars and thirty-five cents, and costs of suit. On October 23, 1876, execution was duly issued thereon and levied upon the real estate described in the complaint; and thereafter, on December 11, 1876, such real estate was sold to Joseph Oliver, one of the respondents in this suit. On May 8, 1877, at a regular term of the

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circuit court of said county, the said Daviner presented the proofs of sale, to wit, the affidavit of J. H. Stevens, Jr., the certificate of S. O. Swackhamer, the sheriff, and his return on the execution; and there being no objections interposed thereto by said appellant, the sale was duly confirmed by said court. In July, 1877, the time for redemption having expired, and appellant having failed to redeem, the sheriff duly made and executed a deed of said premises to Joseph Oliver. On October, 1878, two years after the rendition of the judgment, this suit was commenced, to set aside the sale on the ground that said sale, order of confirmation, and deed were void. This assumption is based upon the allegation that the time, place, and manner of said sale by the sheriff of said real estate were not advertised according to law in this: 1. That the notice thereof was not published for four weeks in a newspaper in the county; 2. That it does not appear that the notice was posted in three public places in the county where the property was to be sold, for four weeks; 3. It does not appear that the sale was on the day and hour mentioned in the notice; 4. It does not appear that there was no personal property of defendant in execution subject to levy.

Exhibit "A," annexed to the complaint, shows that the notice of sale was signed officially by the sheriff of said county, bearing date November 9, 1876, and, after reciting in substance the execution, is to the effect that he has levied on all the right, title, and interest of McRae in and to the following real property (describing it), and that on December 11, A. D. 1876, at two o'clock P. M., at the court-house door of said Union county, he will sell it to the highest bidder for cash. To this is also attached the affidavit of J. H. Stevens, Jr., to the effect that he was foreman of the Mountain Sentinel, a weekly newspaper published at Union, Union county, state of Oregon, and that the foregoing notice of sale was published in said paper once a week for four consecutive weeks, beginning with the issue of November 11, 1876, and ending with the issue of December 1, 1876.

Exhibit "B" is the return of said sheriff on said execution, which recites, among other things, that there being no

Opinion of the Court—Pirim, J.

personal property found, he levied upon the said real property and advertised the same for sale at the court house in the said county of Union, state of Oregon, on the eleventh day of December, 1876, by posting up three notices of said sale in three public places in said county, one of which was posted on the court-house door of said county, and by publishing the same in the Mountain Sentinel, the proof of which was thereto attached. And that in pursuance of said notice the same was sold at public auction at said time and place to Joseph Oliver, he being the highest bidder therefor, subject to redemption. Thus it will be seen that the proof and recitals contained in these exhibits show a substantial compliance with the requirements of the statute in the several particulars complained of by appellant. But it appears that there was a valid judgment, levy, and deed. These were all that a *bona fide* purchaser was required to look to. (Rorer on Judicial Sales, secs. 588, 589; *Wheaton v. Sexton*, 4 Wheaton, 503.)

The matters complained of were mere irregularities which did not render the sale void, but were such as were cured by the order of confirmation.

The code provides that such order is "a conclusive determination of the regularity of the proceedings concerning such sale as to all persons, in any other action, suit, or proceeding whatever." (Civil Code, sec. 293, subd. 4; *Dolph v. Barney*, 5 Or. 192; *Matthews v. Eddy*, 4 Id. 225.) Appellant had three remedies: the right to appear and file objections to the order of confirmation of the sale, the right of appeal, and the right of redemption, all of which he has neglected and failed to avail himself of; nor has he made such a statement of facts as would excuse such laches in a court of equity.

We are of the opinion that the decree of the court below should be affirmed with costs.

Opinion of the Court—Kelly, C. J.

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L. J. SHERMAN, APPELLANT, v. J. D. OSBORN, RESPONDENT.

PLEADING—DENIAL ON INFORMATION AND BELIEF.—Where the plaintiff in his reply used these words: "But whether the defendant was at the time a non-resident of this state, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies the said allegation." *Held*, that this was a sufficient denial of the allegation of non-residence.

APPEAL from Baker County. The facts are stated in the opinion.

L. O. Sterns and John J. Balleray, for appellant.

A. J. Lawrence and L. B. Ison, for respondent.

By the Court, **KELLY**, C. J.:

This is an action brought upon a promissory note made and delivered by the respondent in the state of Nevada. As a defense to the action, he pleads the statute of limitations of that state in the following words: "That said promissory note was made and became due in Elko county, state of Nevada. That at the time said cause of action arose on said promissory note, the said Rhinehart Brothers, the payees, and this defendant were non-residents of the State of Oregon, and that by the laws of the state of Nevada, in relation to contracts made prior to March 2, 1877, an action could only be commenced upon a promissory note in writing within four years from the time when the same became payable."

Although the respondent's defense under the statute of limitations of Nevada might have been set forth with more precision, we nevertheless think it is sufficient to present the defense relied on by the respondent under section twenty-six of the civil code, which provides that "when a cause of action has arisen in another state between non-residents of this state, and by the laws of the state where the cause of action arose an action can not be maintained thereon, by reason of the lapse of time, no action shall be maintained in this state." We think the court did not err in overruling

Argument for Appellant.

the demurrer to the answer. The demurrer to the answer having been overruled, the appellant filed a reply in these words: "But whether the defendant, J. D. Osborne, was at that time, viz., the time when the cause of action arose on said promissory note, a non-resident of the state of Oregon, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies said allegation."

The court held that this was not a sufficient denial of knowledge or information to comply with the statute, and on motion, gave judgment upon the pleadings against the appellant. In this, we hold there was error. It was held by this court in the case of *Robbins v. Baker*, 2 Or. 52, upon a similar denial, and under a statute quite like the one now in force, that it was sufficient.

The judgment is reversed, and this case remanded for trial in the circuit court.

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J. A. STROWBRIDGE, APPELLANT, *v.* THE CITY OF PORTLAND, RESPONDENT.

SEWER IMPROVEMENTS—PROCEEDINGS RELATING TO STREETS DO NOT APPLY.—The common council of the city of Portland, under section 106 of the charter, has power to lay down necessary sewers, and charge their cost to the property directly benefited; and it is not necessary, before proceeding to construct such sewer, that the council shall declare by ordinance that the sewer is necessary, or create a taxing district to be charged with the cost of its construction.

APPEAL from Multnomah County. The facts are stated in the opinion.

W. W. Thayer and Sidney Dell, for appellant:

The common council has made an omission fatal to the assessment, in not having defined and declared the taxing district of the sewer. The complaint shows that the termini of the sewer district are named by the resolution, but the lateral boundaries are not, nor are the lateral boundaries of the latter defined by the law. In ordinary street improvements, the fixing of the termini defines the whole

Argument for Appellant.

taxing district, because the lateral boundaries are limited by the charter (section 97) to lots "abutting" on the street, etc. But in case of sewers, the lateral boundaries are not defined by the charter, but that legislative discretion is delegated to the council, indicating the principle of the limit to be the "property directly benefited" (section 106), and excluding the rule for lateral boundaries in other cases. The common council alone has the power, under the charter, to fix the lateral boundaries of the taxing district for the sewer.

That the council has the power to define the district for taxation will hardly be questioned. It may do so under the general right to do everything necessary to the exercise of this delegated power to make sewers; also, under section 78, authorizing it "to determine everything convenient and necessary concerning such improvements." (Burroughs on Taxation, secs. 146, 147; *Hoyt v. E. Saginaw* (1869), 19 Mich. 39; Charter, sec. 106.)

The council can not delegate that power to individuals. It is confined to them. (2 Dillon, M. C., p. 721, n.) The power of the council to pass ordinances to improve streets is legislative, and can not be delegated. (6 N. Y. (2 Seld.) 92.) It can not delegate, unless specially authorized. (56 Ill. 354; 7 Bush Ky. 599, 667; 2 Dillon, M. C., secs. 618, 590, 288, n.; Burroughs on Taxation, secs. 146, 147; Gilm. Ill. 416.) The legislature may define how large the taxable community may be, whether state, county, ward, etc.

• (58 Pa. St. 320; 104 Mass. 236.)

Defining the taxing district by the council is a fundamental act. Without it, the assessment and all subsequent proceedings are void.

On the Charter. Section 106 declares that when [after] the council shall direct the same [expense] to be assessed on the property directly benefited, "such expense shall in every other respect [i. e., other than the limit of the district and mode of apportionment] be assessed and collected in the same manner as is provided in case of street improvement." And section 79 provides for ten days' "notice thereof by publication." This notice stands in the place of process in

Argument for Appellant.

proceedings. (*Scammon v. Chicago*, 40 Ill. 146.) And it is plain that no process could be served or issued unless the parties or the property to be affected were ascertained with convenient certainty; in a word, unless the taxing district were previously defined and declared. *A fortiori*, notice could not be given where it was not known who were intended to be affected. Notice, then, is a fundamental act, the absence of which voids the assessment. (6 Or. 395.) And as the notice would be void for uncertainty in the absence of a declaration, "by the law or charter," of the property and persons proposed to be affected, it follows that the defining of the taxing district prior to notice is absolutely essential and fundamental. Also, to make a remonstrance possible, under section 81. Also section 80, "must specify," etc., taken with section 106, is an express direction to define it.

On principle and authority. This proceeding is the creation of a lien against the will of the lot owner, and since, as we have shown, no one but the council can define the district to be taxed, it is plainly essential to the claim of lien by the council, that it should specify what property it proposed to affect by the lien; just as in any other statutory lien the property proposed to be affected must be described in the original notice of lien, with sufficient certainty, or else it is void. The obtaining of this lien is the sole purpose of this proceeding; and the defining of the district to be taxed for the proposed improvement is the first necessary step. No more particularity of description of the lien is then required, because it only then affects the general rights of notice and remonstrance. It is a fundamental right of the property owner to have all the property in the taxing district assessed, and when a lot is omitted the assessment is void (51 Cal. 15); therefore, it is essential to this right that the district should be declared. Making sewer does not give the lien, but a strict compliance with the statute does. "Municipal liens rest upon the law alone" (79 Pa. St. 272), and "the power to assess the cost of improvement as a lien can not arise from benefit to the abutting owner."

Jurisdiction to create lien is acquired step by step (61

Argument for Appellant.

Barb. 469), and everything having the semblance (52 Mo. 133) of benefit to the owner must be complied with before lien is acquired or liability accrues by building the sewer." (48 N. Y. 496; 6 Or. 66.) The result of the decisions as stated by Mr. Cooley (Con. Lim. 494, 502) is that a tax must be uniform throughout the taxing district. A state tax is to be apportioned through the state; a county tax through the county; a city tax through a city. If the rule of apportionment is uniform throughout the taxing district the constitutional provision is not violated. (52 Cal. 20.) And this is also a principle of general law that taxation or assessment shall be equal and uniform. An assessment is in the nature of a tax and implies ratio. (29 Mich. 504.) Every requirement of the charter must be strictly pursued unless so purely formal as in no way to bear upon the protection or the right of the parties to be affected.

The declaration of intention to construct the sewer and defining the boundaries of the sewer district must be by ordinance. Compare the following sections of the city charter, to wit: 39; 38, par. 26; 78; 80; 101; and 106 adopts the old act. (27 Cal. 630.)

The "probable cost" must be assessed prior to the construction of the sewer; which has not been done. (City Charter, secs. 82, 84, 85, 102; 2 Dillon M. C., secs. 605, 610, 654; 2 Or. 81.) After one assessment, no power to order another. Hence mode prescribed must be pursued. Previous assessment is notice of the particular property on which lien is claimed and amount.

The next step is the ordinance declaring the time and manner of doing the work. It delegates a discretion to the committee on streets and is void. It provides for a sewer of ten, twelve and fifteen-inch pipe, and adds, "with catch-water basins, man-holes, lamp-holes, sockets, and branches at such points as the committee on streets and public property may designate." (2 Dillon M. C., sec. 618, citing 56 Ill. 354; 1 Id., sec. 60, citing 6 N. Y. (2 Seld.) 92.) City Charter, sec. 101: "Council must provide." (9 Barb. 152; 43 Mo. 359; 46 Id. 100; 52 Id. 133; 50 Ill. 28; 2 Dillon M. C., 605, n. 2: "Liable to abuses," 56 Ill. 354; 60 Ill. 441, 572.)

Argument for Appellant.

This delegation is the door of fraud. Assessment void, because no time nor manner of giving notice of letting the contract was fixed by ordinance or otherwise, and nothing to declare what a "proper notice" was. This was a discretion imposed on the common council to decide and determine, and failing to do so, there was no legal notice. The charter, sec. 101, requires the council to accept or reject the bid, and vests in that body a discretion as to bids by lot owners. But the council never acted on the bid, and, therefore, the contract is void.

Omission of street railway property and Corbett's four lots voids the assessment. Street railway liable to assessment. (32 Cal. 409, 499; 38 Conn. 42; 10 Ohio St. 159, 164; 12 Iowa, 112; 60 Ill. 441.) If one lot is left out of the assessment, it violates the rule of uniformity and ratability, and it is void. (51 Cal. 15; 31 Id. 241; 32 Id. 409, 499; *Upington v. Oviatt*, 24 Ohio St.)

The proviso to section 106 of the city charter does not authorize the council to delegate its power of *assessment* to three disinterested persons. It only authorizes them "to estimate and determine"—not to assess—"the proportionate share of the cost of the sewer" that ought "to be assessed"—not to the lots or parts of lots, but "to the several owners of the property" which has already been declared by the council to be "benefited thereby." (40 Ind. 235.) Assessment should show the amount each lot is liable for, though there are different owners. It requires the most explicit language to authorize council to delegate its power. (6 N. Y. 92.) The proviso certainly does not authorize the three to define and declare the taxing district; nor to declare what property in that district is directly benefited; nor to estimate and determine what the whole cost of the sewer is or may be; nor to apportion it among the several lots and parts of lots, according to the ratio of benefits. But it assumes all these to have already been done, at the time the three are appointed.

The law requires (sec. 106) the assessment to be in the ratio of direct benefits, and not in the ratio of cash value.

Argument for Appellant.

The true rule is the direct increase in the market value, which in this case is shown by the bill to be equal for each lot in proportion to its superficial area; and that by cash value is not according to benefits. (Burroughs on Taxation, sec. 148, p. 472.) City charter, sec. 106, prohibits cash value as mode. (2 Dillon M. C., p. 693, sec. 596 n.) If for benefits, "frontage not sufficient, and the report of commissioners must show it was on right basis." (36 Conn. 66; 20 N. J. L. 104, 115.) "Cash value without improvements" wrong discrimination. (2 D. M. C. sec. 620, citing 4 Scam. Ill. 78; 35 Mich. 159; 51 Cal. 15; 32 Id. 499.) "Just and equal" means "benefits." May be by frontage benefits or superficial contents. (28 Cal. 325; 2 Brod. & B. 691, 10 Coke, 143 a.) "Assessment for sewers ought to be according to quantity of their land, tenants, and rents and by acres and perches according to rate of every man's portion, tenure or profit, or by the quantity of the common or pasture or of fishing or other commodity." Primarily by "acre;" if other interests, by rents, etc. Per acre good. (2 Strange, 1127; 2 Maule & S.; 3 Barn. & Ald. 21.)

By superficial area held good in 48 Miss. 367; 38 Id. 652; 27 Id. 458; 21 Ark. 40; 14 La. 498; in which last case it is intimated that as it costs as much to protect one acre of land from overflow as it does to protect another, the apportionment not unjust. Also 27 Mo. 497; 36 Id. 456. Equity has jurisdiction to set aside the assessment. (2 Or. 146; 17 Wend. 660, 668.)

Equity, where the assessment is void, will not refuse to set it aside on the maxim that "he who asks equity must do equity," because the defendants have no equity to be done. If they have acquired no lien, then they have no rights, but their proceedings constitute an illegal cloud which plaintiffs have a right to remove. (*Upington v. Oviatt*, 4 Ohio St.; *M. Steese v. Oviatt*, 24 Ohio St.) The defendant had a right and equity because, notwithstanding defects, it could recover a *quantum valebat*, and it did not appear but what the amount assessed was reasonably worth it.

Argument for Respondent.

J. C. Moreland, City Attorney, and J. H. Reed, for respondent:

The authority relied on by the respondent is found in the charter:

"Sec. 106. The council shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvement of streets prescribed in sections ninety-seven and ninety-eight of chapter eight of this act shall not apply to the construction of such sewers or drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in case of street improvement; *provided*, that the council may, at its discretion, appoint three disinterested persons to estimate and determine the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby."

The complainants allege that the council ought to have first established what their attorney is pleased to term a "sewer district." But there is no authority whatever for such a proceeding. The council, in this case, caused a notice to be published—and in the notice it was stated that certain property would be assessed. This was a matter purely *ex gratia*, and can not affect this cause. They were under no obligation to give any notice, or publish any resolution. Their authority is found in the section quoted, and there is certainly nothing in that which requires the council to give a notice, or establish anything which could be called a sewer district. They have the power to appoint three disinterested persons to establish and determine the proportionate share of the cost of such sewer to be assessed to the several owners of the property benefited thereby. This was done, their report was adopted by the common council by ordinance; and we insist that their action in this matter is final, and will not be set aside, or revised by a

Argument for Respondent.

court of equity, except for fraud, accident, or mistake, and neither of these is alleged.

As was said by Judge Cooley, in a similar case: "So long as the common council keeps within the limits of its jurisdiction, as defined by the constitution and statutes of the state, and its members are guilty of no intentional wrong or corrupt conduct in the discharge of their official duties, the courts have no power to control the exercise of their legal discretion, or to overrule and set aside their judgment; but must accept their conclusions as warranted by the facts, and as binding alike upon the city and upon all of its inhabitants." (*Motz v. Detroit*, 18 Mich. 516. This was cited and approved in 43 Ind. 197.)

Acting within the scope of their jurisdiction, the findings of the common council can not be impeached, except for fraud. Their discretionary power is not subject to review. (Charter, sec. 139; 48 Ill. 285, 293, 296; 2 Or. 298; Dillon on Mun. Corp., secs. 58-476; High on Injunctions, sec. 785; Cooley on Taxation, sec. 528; 32 Barb. 410; 4 Johns. Ch. 344-353; 6 Johns. 28; 25 N. Y. 312; 46 Id. 109; 48 N. Y. 518.)

The allegation that there is property along the line of the street which is benefited will not render the tax void. The case upon which counsel founds his argument upon this point (51 Cal. 15) contains a complete refutation of his position. (See 22 Ill. 311.)

We admit the rule that the burden of taxation must be uniform. This is a constitutional provision and must be observed, but it must be enforced with a view to give the constitution a practical operation. As was truly said in 10 Wis. 242 (quoted with approval in 51 Cal.), "when mere mistakes occur on the part of officers who are endeavoring, in good faith, to discharge their duties, this ought not to invalidate the whole levy." And we respectfully submit that any different view would render nugatory the whole taxing power. But this matter of the benefit to property not included in the assessment, as alleged by complainants, is simply a difference of opinion between the viewers and

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the appellants, and certainly a court will not undertake to settle such difference. (60 Ill. 441.)

Appellants claim that the council ought to have ascertained and declared the probable cost of the sewer as is provided in sections eighty-four and eighty-five of the charter in case of street improvements. To this we answer: 1. Those sections do not and can not apply to the construction of a sewer. Section one hundred and six, we insist, furnishes the only rule, and if so, there is no such thing as declaring the probable cost before a contract is let. 2. Sections eighty-four and eighty-five are merely directory and are not mandatory, and the failure of the council to take this step certainly would not invalidate this levy and render the whole assessment void. The omission to take this step injures no one. There is no failure of jurisdiction, and the same presumption at least ought to attach to the proceedings of the common council as attaches to courts of inferior jurisdiction; *i. e.*, that when once a jurisdiction is established all steps that ought to have been taken are conclusively presumed to have been taken. It will be further seen that in sections eighty-four and eighty-five the words "probable cost" are used, while in section one hundred and six, in speaking of sewers, the words "proportionate share of the cost" are used. It would involve an absurdity to say that the council should estimate the "probable cost," and afterward, when the work was done, appoint three disinterested persons "to estimate and determine the proportionate share of the cost" to each owner benefited. Section one hundred and six must stand alone in that regard.

The allegation in their complaint, that the sewer is a benefit to Yamhill street, constitutes no objection to this assessment. The city has no property in the street. The fee is owned by the adjoining lot owners, subject only to the rights of the public to use as a highway. (See 84 Ill. 227; *Bigelow v. Chicago*, Chicago Legal News, Jan. 1879.) But the main objection to the assessment, and the one which was uppermost in the minds of the complainants in seeking this injunction, is the mode adopted by the viewers in making their assessment. As alleged in the complaint they adopted the

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mode of apportioning according to the value of the property, irrespective of the improvements, making some allowance for the distance of the property from the sewer. We submit that this was correct. The method of making the assessment is not defined by the charter except that it must be on the property benefited. The mode is left to the discretion of the council, and under section one hundred and thirty-nine of the charter, this discretion when once exercised can not be called in question elsewhere.

The appellants maintain that the proper manner of making this assessment was the superficial area, but if we examine section one hundred and six we find that sections ninety-seven and ninety-eight do not apply to the construction of sewers and drains, and section ninety-seven provides that the cost of a street improvement is made upon the basis of a superficial area. Judge Dillon, in section six hundred and forty-five of his authoritative work on municipal corporations, says: "The apportionment" for building a sewer "should be made upon the value of the land independently of the buildings and should be settled at the time of the transaction." (9 *Cush.* 233; 35 *Mich.* 155; 35 *Conn.* 66; 7 *Cush.* 200; *Burroughs on Taxation*, secs. 147, 148; 38 *N. J. L.* 171, 190.)

Courts of equity will not grant relief when there is a plain, speedy, and adequate remedy at law. If the allegations of plaintiffs' complaint be true they have this remedy at law. They had a complete remedy under our writ of review. "If the power to levy the tax exist, and the property be subject to taxation, mere errors and irregularities should, according to the better considered view, be corrected on certiorari or other appropriate proceedings, or their effect left to be tested at law." (*Dillon on Mun. Corp.*, sec. 737; 5 *Wallace*, 413-419; 14 *N. Y.* 534.)

An injunction will not lie to restrain the collection of a tax, unless there are some special equities to render the tax unjust and illegal. (*High on Inj.* 785.) As to the allegation of cloud upon title, respondents say that if the proceedings are void upon their face, and need no extrinsic evidence to establish such invalidity, they can not cast any cloud upon

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their title. (1 Deady, 491; 5 Wallace, 418; 14 N. Y. 534, 541, 542; 47 Mo. 479; 26 Wend. 131; Dillon on Mun. Corp., sec. 476; 9 Paige, 16, 388.) "Courts of equity will not interfere where the act complained of in levying the tax was done according to the best judgment of the assessors, fairly and impartially." (4 Johns. 353, 354; 1 Cal. 455.)

There are no equities in the complaint. This was the principal ground upon which the court below decided this cause for the respondents. In passing upon this point the court said: "The general and well-established doctrine is, that when property is subject to taxation, and the tax is a legal one, equity will not interfere simply because there are irregularities in the assessment. Thus Mr. Dillon says: 'When the defect complained of is merely formal, not impeaching the justice of the tax or assessment, and the plaintiff ought to pay the amount, equity will not interfere, but leave him to his legal remedies.' A large number of cases are cited as sustaining the doctrine." (Dillon on Mun. Corp., sec. 738.)

"In Indiana it is held that where the owner of real estate in a city stands by and sees a street improved adjoining his property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he can not, after the work is completed, or nearly completed, refuse to pay for it. In Michigan, this view of the estoppel of the property owner is taken. In Kansas, it is decided that courts of equity will not interfere to restrain by injunction the collection of taxes, when the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the assessment. There must be a tender of what is equitably due. These are citations from Mr. Dillon's note to the section quoted, and the author adds that the same view is substantially taken by the supreme court of Missouri."

"Who seeks relief from an over-assessment must pay what is justly due. So one who sought to have an invalid tax deed set aside as a cloud on title, he having been in default in not paying his taxes, was relieved only on paying all taxes paid by the holder of the deed. (Story's Equity Jur., sec.

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63, note.) These are citations from Mr. Story to illustrate the doctrine of the maxim, 'He who seeks equity must do equity.' "

"In 24 Ohio State Reports, the same principle is applied in a case much like this. In that case a suit by injunction was brought to enjoin the collection of an assessment upon certain lots in the city of Akron, made by authority of the city council, to pay the expense of grading and paving a street. The statute required an advertisement for bids for the work to be published four weeks in two of the newspapers in the city. The court said that this provision was intended for the protection of the tax-payers, to secure competition among contractors, and prevent favoritism and fraud, and that it must be regarded as peremptory; that not having been complied with, the defect was substantial; that it went to the legality of the contract and of the subsequent assessment. The contract having, however, been let and the work done, it was held that equity would not interfere so long as the amount charged upon the lots was no more than the reasonable value of the work ratably chargeable upon such lots; that it would only interfere if the assessment was more than was properly chargeable upon the property, and then only to the extent of granting relief against the collection of the excess." (24 Ohio St. 246.)

"As already stated, it is expressly admitted in the petition in this case that these lots 'are all within one hundred feet of Yamhill street; that they 'all lie along the line of said sewer, and are directly benefited' by it, and it is admitted also that the lots directly benefited are legally chargeable with the cost of the sewer.' "The case is thus clearly within the well-established rule laid down by the authorities cited. The alleged irregularity of the assessment affords no ground for the interference asked for. If the lots of the petitioners are assessed more than their ratable proportion, the court will not, for that reason, relieve the petitioners from payment of their ratable proportion." "They must show a willingness to pay what is due *ex aequo et bono* before this court will interpose in their behalf. This they refuse to do. They ask to be relieved from all liability on account

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of work which they admit is for their benefit, and for which they admit their lots are equally chargeable. If it is true, as claimed by counsel for petitioners, that it is threatened to enforce against them a pretended right or lien, which, by reason of the irregularities complained of, does not exist in law, their rights against such threatened attempt are legal rights, which will only be enforced in courts of equity when they rest upon equitable grounds." (See Dillon, sec. 737; Cooley on Taxation, 540; 1 Dan. Ch. Pr. 385, 386.)

These complainants come before this court of equity saying that their property has been benefited; that the city had authority to make the assessment, and yet asking that they may be relieved from all liability. There is nowhere in this charter any power or authority to make a reassessment. If this tax be declared void, either the contractor who constructed the sewer, or the city, must suffer the loss, while these complainants will reap the benefits. If courts of equity are created for the purpose of enforcing such an inequitable decree as this would be, then the ideas prevalent in regard to such courts need reconstruction.

By the Court, BOISE, J.:

This is a proceeding by injunction to restrain the defendants in the collection of certain assessments for the construction of a sewer in Yamhill street, in the city of Portland, and to declare such assessments illegal and void.

The petition alleges in substance that on the twenty-seventh day of June, 1878, the common council of the city of Portland passed a resolution to the effect that notice be given that the council propose to construct a sewer in Yamhill street within specified points and of specified dimensions; "the expense thereof to be assessed upon the property benefited."

That on the sixth day of July following, a notice of the proposed sewer improvement was published in the Daily Standard newspaper, daily, from ten days from said date. This notice concluded as follows: "The expense thereof (of the sewer construction) to be assessed upon the property benefited thereby. It is hereby understood that the

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property benefited will include all lots or parts of lots lying within one hundred feet of Yamhill street on either side thereof, and between Front street and the termination thereof."

That within ten days from the publication of this notice a written remonstrance against the proposed improvement was made and filed by the owners of two thirds in value, but not quite two thirds in area, of all the property adjacent to that part of Yamhill street described in the notice.

That on the twenty-second day of August, 1878, an ordinance, numbered 2246, was passed, "providing for the time and manner of improving Yamhill street from the Willamette river to a point one hundred feet west of the west line of Tenth street by putting in a sewer at the expense of the property benefited." This ordinance specified particularly the character of the improvement to be made; that it should be done to the satisfaction of the committee on streets and public property and the superintendent of streets. The ordinance authorized such committee to advertise for and receive proposals for the work, and to enter into a contract with the lowest responsible bidder or bidders therefor. It further provided that the expense of the sewer should be assessed to the property directly benefited thereby.

The petition further alleges in effect that on the fourteenth day of September, 1878, a notice to contractors for sealed proposals for the construction of this sewer was published in the Daily Bee, as provided in the ordinance, and thereafter the committee entered into a contract for such construction, and that such sewer was constructed prior to December 1, 1878.

That on the fourth day of December the council by a resolution appointed Burrage, Holmes, and Norris to assess the cost of the construction of the sewer, as provided by ordinance 2246, to the several lots and parts of lots benefited thereby.

That these commissioners found the probable cost of the sewer to be five thousand nine hundred and ninety-nine

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dollars and fifty-four cents; that the property benefited consisted of all lots and parts of lots lying within one hundred feet of Yamhill street and between the Willamette river and a point one hundred feet west of the west line of Tenth street; and that the commissioners made report that they had "apportioned the estimated cost of said sewer to the several lots and parts of lots and assessed the benefits to be derived therefrom as follows:" (Here follows a table showing the number of each block, the number of each lot or part of lot, the name of the owner and the benefits assessed.)

It is further alleged that an ordinance was passed, declaring the probable cost of the sewer, and assessing the same to the property benefited, according to the report of the commissioners, and directing an entry of the assessment on the docket of city liens, and that notice of this assessment was duly given.

The petitioners allege as grounds of complaint that the probable cost of the sewer was not ascertained and determined, or apportionment or an assessment thereof made to the different lots by ordinance prior to the construction of the sewer; that the council did not defend the taxing district of the sewer; that the commissioners did not apportion the cost of the sewer to the property directly benefited in the rates of benefits accruing; that they adopted the mode of apportioning according to the proportion which the cash value of the lots bore to each other, making allowance for the distance of the lots from the sewer; that the lots are of unequal value in proportion to their area; that Yamhill street is the property of the city of Portland, and that a proportionate cost of the sewer should have been assessed to such street against the city; that certain lots have not been assessed as the names of the owners.

It was argued by counsel that the powers exercised by the commissioners in apportioning the benefits and cost of the improvement could only be exercised by the council.

The petitioners admit that their lots are within one hundred feet of Yamhill street; that they lie along the line of the sewer, and are directly benefited thereby.

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The defendants demur to the petition upon the grounds that the court has not jurisdiction, and that the petition does not state facts entitling the petitioners to the relief prayed for.

It is urged that the proceedings establishing this sewer, so far as the same seek to impose a tax on the property of the petitioners, are void, and that the collection of the tax can not be enforced, and that the tax is illegal and not a just lien on the property of the petitioners. Petitioners claim that in order to legally establish the right by the city to construct a sewer, the city council should first declare by ordinance that the sewer is necessary, and describe its location and define the district that is to be benefited and charged with the cost of its construction.

The decision of these questions involves the construction of section 106 of the charter of the city of Portland, which is as follows: "The council shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvements of streets prescribed in sections 97 and 98 of chapter 7 of this act shall not apply to the construction of sewers or drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall in every other aspect be assessed and collected in the same manner as is provided in case of street improvements; provided, that the council may, at its discretion, appoint three disinterested persons to estimate and determine the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby."

This is the only section of the charter providing for or regulating the construction of sewers. It provides that sections 97 and 98 of the charter, providing what lots shall be taxed with street improvements, and in what proportion the assessment shall be made on each, shall not apply to the construction of drains and sewers. These sections provide that the assessment for street improvements shall be proportioned to superficial area of the adjoining lots, so

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that the provision in section 106, that these sections shall not apply to the construction of sewers, plainly indicated that a different rule was intended to be established in apportioning the cost of sewers to those directly benefited. The proviso at the end of section 106 directs the manner in which the cost of construction of sewers shall be ascertained and apportioned. The provision in section 106, that when the council shall direct the "expense of construction to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in case of street improvements," simply adopts the means of enforcing against those directly benefited the collection of the tax apportioned to them by the estimate made by the disinterested persons appointed to make the apportionment in pursuance of the provisions of section 106. The mode of inferring these charges on the property benefited is provided for in sections 85, 86, and 87.

The elaborate manner pointed out in the charter for acquiring the authority to construct street improvements, does not apply to the construction of sewers. The latter may be laid when in the judgment of the city council the same shall be necessary. They may be made without previous notice, the council alone being the judge of their necessity. Sewers are required as a part of the sanitary regulations of the city, to prevent the development of local disorders, and generally to preserve the public health. It may, and often does, happen in populous towns, that active measures have to be taken by city authorities in sanitary measures, and it would not be wise to leave so important a power, often requiring the most prompt exercise, to the tardy mode provided for inaugurating street improvements. Section 106 alone provides for the manner of making drains and sewers. The only question is, Has the city council properly exercised its powers under such section?

It is claimed by the counsel for appellant that the council should have first declared by ordinance that a sewer was necessary. Such an ordinance was not essential to give them power to construct the sewer. The charter does not

Points decided.

require such an ordinance as preliminary to their proceeding to construct the sewer. No public good would be accomplished by such declaration. When they passed the resolution to construct the sewer, and located its termini, that action showed that in the opinion of the council it was necessary. It is also urged by the appellant that the resolution did not fix the lateral bounds of the district to be charged with the cost of construction.

From what has been said, it follows that the council had power to proceed and lay down the sewer, and then ascertain, by the method provided in the proviso of section 106, what property was directly benefited. So there is nothing in this objection. The proceedings of the council, as set out in the complaint, show that the same are a substantial compliance with the provisions of the charter providing for the construction of sewers. The view we take of section 106 of the charter renders it unnecessary to notice any other points which were discussed in the argument.

The decree of the circuit court will be affirmed.

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BEN HOLLADAY ET AL., RESPONDENT, v. S. G. ELLIOTT, APPELLANT.

CORPORATION—SUBSCRIPTION TO STOCK.—Articles were filed, under the general incorporation law, to incorporate the Oregon Central Railroad Company, with a capital stock of seven million two hundred and fifty thousand dollars, divided into seventy-two thousand five hundred shares of one hundred dollars each. Six different persons subscribed one share each, when one of them, in behalf of the corporation, made a subscription in the following words: "Oregon Central Railroad Company, by G. L. Woods, chairman, seventy thousand shares, seven million dollars." *Held*, that this subscription for the company was a nullity, and that those who had subscribed the six shares could not lawfully elect a board of directors and organize the corporation, and that a board of directors elected by them could not lawfully transact business for the corporation.

PARTNERSHIP—DISSOLUTION, WHEN BUSINESS NOT PRACTICABLE.—Where, during the continuance of a copartnership, it becomes impracticable to carry on its business without great loss, a court of equity will decree a dissolution of such copartnership, in a suit brought for that purpose by any one of the partners.

Statement of Facts.

APPEAL from Marion County.

This is a suit begun November 5, 1869, for a dissolution and settlement of a copartnership. The case was referred to a referee to report findings of fact and conclusions of law, and upon his report a decree was rendered, in the circuit court, in favor of the respondents, dissolving and settling the copartnership. From that decree, the defendant, Simeon G. Elliott, brings this appeal.

The facts in the case are substantially as follows: On or about the twenty-second day of April, 1867, a corporation was formed under the general incorporation laws of this state, under the name of the Oregon Central Railroad Company, for the purpose of building and operating a railroad from Portland, Oregon, southward to the California line, on or near the stage road, and having its principal office in Salem, Oregon. The capital stock of the corporation was seven million two hundred and fifty thousand dollars, divided into seven thousand two hundred and fifty shares of one hundred dollars each. On the day the corporation was formed, six different persons subscribed one share each to this stock, and thereupon there was an attempt to subscribe seventy thousand shares by the company, of its own stock, by a subscription, as follows: "Oregon Central Railroad Company, by Geo. L. Woods, Chairman, seventy thousand shares—seven million dollars." Upon the same day, the corporation entered into an agreement with Elliott, acting for A. J. Cook, for the construction of one hundred and fifty miles of road. This contract was modified by a supplemental contract, on November 27, 1867.

On the twentieth of May, 1867, Elliott assigned seven twentieths of this contract to one Perrin, and thereupon Perrin and Elliott formed a partnership under the name of "A. J. Cook & Co., " for the carrying out of the contract in question. On the twenty-ninth of the same month, Elliott assigned one tenth of the contract to one Flint. In April, 1868, he assigned seven twentieths to Froham, and in March, of the same year, he assigned to Brooks two twentieths, and to Gardiner Elliott one twentieth. About the

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twelfth day of May, 1868, the appellant, S. G. Elliott, in the name of A. J. Cook & Co., entered into another agreement, or contract, for the construction of the balance of said road from the end of the first one hundred and fifty miles to the California line, being two hundred and ten miles more or less. On the second of May, 1867, A. J. Cook, for a consideration of one dollar, assigned the contract of April, 1867, to the appellant.

On the twelfth of September, 1868, the respondents, Holladay and Emmet, and the appellant Elliott, formed a partnership for the purpose of taking, by assignment, the contracts of A. J. Cook, and A. J. Cook & Co., with the railroad company, and of constructing and operating one or more railroads in Oregon and the adjacent territories. The interest of each in the partnership was as follows: Holladay, twenty-four fortieths parts; Emmet, ten fortieths; Elliott, six fortieths. This is the partnership involved in this suit. The various interests in the contracts referred to passed to this partnership. It was a part of the agreement of partnership, that Elliott should not be required to advance money in carrying out the contracts of construction; but, that when the partnership should realize enough on its contracts to cover expenses, he should be charged with his proportion of the expenses, and that he should be general superintendent in the construction and operating of the road, at a salary of five hundred dollars per month. A further stipulation in this agreement is contained in the following writing, delivered to Elliott by Ben Holladay & Co., that being the partnership name:

OFFICE BEN HOLLADAY & Co.,
PORTLAND, Oregon, September 12, 1868. {

S. G. ELLIOTT, Portland—Dear Sir: On our purchase of this date from A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Company for the construction of the railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co. and standing to your credit on their books. This money is stated by you to amount to about twenty-one thousand dollars. When

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the accounts are fully made up and the balance correctly ascertained, you will be entitled to our obligations for the correct amount. Respectfully yours,

BEN HOLLADAY & Co.

The partnership of Ben Holladay & Co. built a part of the road under these contracts, and appropriated it to their own use, the O. C. R. R. having no legal organization. Subsequently the partnership sold the road to a new corporation formed to purchase and complete it. While the work was progressing Elliott was discharged from the position of general superintendent for incompetency. The respondents claim that Elliott made false and fraudulent representations, to induce them to go into the partnership in question, as to the financial standing and character of A. J. Cook and A. J. Cook & Co., as to the amount of money advanced by them towards the building of the road, as to the bonds which were available in their hands, the amount of work already done, the cost of completing the road to Salem, and as to his own competency to superintend the construction and operating of the road. The referee, Mr. J. C. Moreland, reported fully upon all the issues in the case, and found that the respondents were entitled to recover from the appellant five hundred and thirty dollars and eighty cents.

The case was tried upon the findings and testimony by Mr. Justice Boise at circuit, and some modifications made in the findings of the referee. The circuit court found for the respondents in the sum of four hundred and seventy-seven dollars, but not for costs.

W. H. Effinger and H. H. Gilfrey, for appellant.

Dolph, Bronaugh, Dolph & Simon, and Thayer & Williams, for respondents.

By the Court, KELLY, C. J.:

The complaint abounds in charges of false and fraudulent representations alleged to have been made by the appellant to the respondents, to induce them to enter into the

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copartnership of Ben Holladay & Co. These are all denied by the appellant in his answer; and while he sets forth no counter allegations of fraud in the answer, yet he insists that the evidence in the cause establishes the fact that the respondents fraudulently entered into that copartnership, with the sole object of taking from him a large amount of valuable property which he then possessed in the contracts of A. J. Cook and A. J. Cook & Co. with the Oregon Central Railroad Company.

We think the evidence, which is voluminous beyond all precedent in the courts of Oregon, fails to establish these charges of fraudulent conduct either on the part of the appellant or the respondents. Doubtless the appellant made statements which were not strictly accurate as to his qualifications to act as superintendent in the construction of a railroad, as to the value of the property and the contracts owned by the firm of A. J. Cook & Co., and as to the amount of money which would be required to complete the grading of the road from Portland to Salem; yet we are satisfied these statements were not made by him with an intention to deceive and defraud the respondents, or to induce them to enter into the contract of copartnership with him. He undoubtedly at the time believed them to be true; and while we believe that all the parties to it entered into the contract in good faith, and honestly intended to construct the road in accordance with the terms of the copartnership, yet we are equally well satisfied that, under the circumstances, it was an impracticable undertaking. Unquestionably the agreement of copartnership was formed on the basis that the stock and bonds of the O. C. R. R. Co. held by A. J. Cook & Co. were of great value, and that by a sale of them money sufficient could be realized by the firm of Ben Holladay & Co. to go on with the construction of the road, and eventually complete it. Within a year preceding that time, the appellant had sold a number of these bonds, amounting to about thirty-eight thousand dollars, at their par value to parties in Boston in payment for locomotives and machinery for the road. He probably had some reason to believe that the remainder of the seven hun-

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dred and seventy-five thousand dollars of bonds could be sold on the same advantageous terms. The fact of this sale to parties in Boston was communicated by him to the respondents during the negotiations which preceded the formation of the copartnership, and probably gave them a high appreciation of their worth; and with this estimation of their value they entered into the agreement of September 12, 1868.

The referee found that these bonds were of no value in the market, and that the "preferred interest-bearing non-assessable stock issued by the O. C. R. R. Co. was illegal and of no value." The circuit court approved this finding of the referee, and we entirely concur in this view of the court below. The reason for this opinion we will now proceed to give:

On the twenty-second day of April, 1867, John H. Moores, J. S. Smith, George L. Woods and others filed articles of incorporation in the office of the secretary of state and in the office of the county clerk of Marion county to incorporate the Oregon Central railroad company. The capital stock was fixed at seven million two hundred and fifty thousand dollars, divided into seventy-two thousand and five hundred shares of one hundred dollars each. On the same day stock books were opened, when six shares of stock were subscribed by six different persons; then followed this subscription: "Oregon Central railroad company, by George L. Woods, chairman, seventy thousand shares, seven million dollars." On the same day directors and other officers were elected, and on the twenty-third day of April, 1867, the O. C. R. R. Co., thus organized, entered into the contract with A. J. Cook to construct one hundred and fifty miles of its road from Portland south through the Willamette valley, for five million two hundred and fifty thousand dollars, to be paid in first-mortgage bonds of the company, payable in twenty years, and to be taken by the contractor, A. J. Cook, at par. Payments of eighty per cent. were to be made by the O. C. R. R. Co. for the work done by A. J. Cook, to be paid every month as the work progressed. The O. C. R. R. Co. also agreed at

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the same time to issue two million dollars of preferred stock, unassessable and bearing interest at the rate of seven per centum per annum, and deliver the same to A. J. Cook immediately after signing the contract, and that the common stock of the company should be offered to the people of Oregon at ten cents on the dollar. Afterwards the appellant, who became the owner of the A. J. Cook contract, associated others with him under the firm name of A. J. Cook & Co., and on the twenty-seventh day of November of that year, entered into a supplemental agreement with the O. C. R. R. Co., whereby, in consideration of materials bought for the construction of the road, the company agreed to issue and deliver to A. J. Cook & Co. seven hundred and seventy-five thousand dollars of first-mortgage bonds on its railroad and franchises, and the bonds were issued accordingly. The two million dollars of preferred stock specified in the agreement of April 23, had already been issued and delivered by the O. C. R. R. Co. to A. J. Cook & Co. One million dollars of this preferred stock was given back to the directors of the company according to a private understanding with them, that they were to have it to be used by them in procuring the necessary legislation in Oregon to promote the interests of the corporation. This delivery to the directors of one million dollars left still one million dollars of the preferred interest-bearing non-assessable stock in the possession of A. J. Cook & Co. This is the stock, and these are the bonds, less thirty-eight thousand dollars, which were transferred by A. J. Cook & Co. to the firm of Ben Holladay & Co. upon the formation of the copartnership.

We will now consider more fully the manner in which the O. C. R. R. Co. was attempted to be organized on the twenty-second of April, 1867. The constitution of Oregon, article 11, sec. 4, provides that "the stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed, and no more."

By sec. 14, p. 527, of the general laws of Oregon, it is declared that an original stockholder in a corporation who

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makes a voluntary sale of his stock is nevertheless liable to any existing creditors for any unpaid balance due thereon, unless the same be paid by the purchaser. No subscriber to the capital stock of a corporation can be exempt from liability to pay the amount of his subscription any more than he would to pay a promissory note subscribed by him. And it is necessary it should be so in order that the corporation may be enabled to pay any indebtedness created by it. The attempt to subscribe seventy thousand shares to the stock of the O. C. R. R. Co., by the corporation itself through a person styling himself chairman, was done simply to evade the liability which the law imposes on all persons who subscribe to the capital stock of corporations.

This act was a mere nullity, and added nothing to the amount of stock subscribed, which was then only six shares of one hundred dollars each. Those who subscribed the six shares then proceeded to elect the directors and other officers of the corporation. It was under the organization so made and by officers thus elected that the O. C. R. R. Co. transacted its business, and issued the stock and bonds before referred to. The corporation was not organized according to law, but in direct violation of the statute which provides that "it shall be lawful in the organization of any corporation to elect a board of directors as soon as one half the capital stock has been subscribed." (Misc. Laws, p. 526, sec. 7.)

Where the statute prescribes the manner in which a corporation shall be organized, its requirements must be substantially complied with, otherwise it will have no legal capacity to transact any business as a corporation. In this case the attempted organization of the O. C. R. R. Co. amounted to nothing. It was absolutely void. Nor did the joint resolution of the legislative assembly, adopted October 20, 1868, recognizing this corporation as the one entitled to receive the land granted by act of congress, to aid in the construction of a railroad, cure the inherent defects of its organization. It had no power to legally transact any business nor to accept or hold the lands so granted.

Upon the formation of the copartnership of Ben. Holladay

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& Co. in September, 1868, the work of constructing the railroad under the contracts of A. J. Cook and A. J. Cook & Co. was continued under the appellant as general superintendent. It was prosecuted with reasonable vigor until December, when it was partially suspended, and from that time until July, 1869, but little work was done. During the month of May only nine men were employed, and during June only eleven on the whole line of the road from Portland to Salem. The appellant was absent in the Atlantic states during the preceding winter and returned too late to commence operations on the road during the months when work could have been prosecuted with the greatest benefit to the firm. The best season of the year for profitable labor in railroad building was suffered to go by with singular inactivity and want of foresight, when we take into consideration the necessity of having the first section of twenty miles completed before the twenty-fifth day of December, 1869, in order to secure the land from forfeiture, which the O. C. R. R. Co. claimed to own. The result was that the appellant was discharged by the firm of Ben. Holladay & Co. from their employment as general superintendent, and his alleged inefficiency was made the pretext for the discharge. After he ceased to act as superintendent, on the fourth day of October, 1869, a largely increased force of laborers was placed on the road, far higher wages were paid for workmen, and in this way this section of twenty miles was completed on the twenty-fourth day of December, 1869.

The appellant, however, insists that this lack of vigor in the prosecution of the work was not owing to his incompetency as an engineer, nor to his inefficiency as a general superintendent, but that it was caused by a want of money to employ a sufficient force of laborers upon the road. He says that Holladay directed him to discharge some men who were then employed because there was no money to pay them. We think the testimony clearly shows that one of the chief causes why the work progressed so slowly during the spring and summer of 1869 was the inability to procure the funds necessary to carry it on more vigorously. At the time of entering into the copartnership and for some months

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afterwards the respondents expected to obtain sufficient money to construct the first section of twenty miles by a sale of the bonds of the O. C. R. R. Co., which Ben Holladay & Co. had received from A. J. Cook & Co. In this they were disappointed. Emmett, Goldsmith, and others had tried in vain to negotiate these bonds and found it impossible to sell them at any price. The evidence shows that they were worth nothing in the money markets of the country. The reasons for this are quite apparent from the testimony in the case. Suits had been commenced in the United States circuit court and in the circuit courts of this state against the O. C. R. R. Co. to test the legality of its existence as a corporation, and they had so far progressed as to foreshadow its overthrow. Joseph Gaston, the president of a rival corporation of the same name, known as the Oregon Central Railroad Co. (west side), had issued circulars and sent them to bankers and brokers in the east, setting forth in language more forcible than elegant, that "the corporation was a humbug and its bonds were worthless." It was known that the company was hopelessly insolvent; that Ladd & Tilton had presented to it for payment certain interest coupons which were protested for non-payment, and that there were no subscribers to the capital stock of the corporation, from whom any money could be collected to defray the rapidly accumulating interest on the bonds, and its preferred interest-bearing stock. Under these circumstances it could hardly be expected that the bonds offered for sale would be considered of any value anywhere.

But it is contended by the appellant that the respondents were under obligations to furnish the means to construct the road. It is stipulated in the articles of copartnership that the appellant shall not be called upon to advance any money out of his own private means towards the work undertaken by the copartnership, and an inference might be raised that the respondents were required to do so. But it can hardly be presumed in the absence of any express stipulation in the agreement that they were to furnish out of their own private funds many millions of dollars to build a railroad, and, as it should be constructed in sections of twenty miles, transfer the same to the O. C. R. R. Co. for its worthless bonds,

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and its equally worthless stock. To have gone on and attempted to complete the road under the contracts of A. J. Cook & Co. with that corporation, would have been simply an act of folly. It would have bankrupted not only Ben Holladay & Co., but financially ruined every member of the firm. In short, we consider that it was an impracticable undertaking to construct the railroad under the copartnership of Ben. Holladay & Co., and in such cases courts of equity will decree a dissolution of the copartnership, where any one interested in it brings suit for that purpose. (*Fogg v. Johnson*, 27 Ala. 432; *Durbin v. Barber*, 14 Ohio, 317; *Brien v. Harrison*, 1 Tenn. Ch. 467; Story on Partnership, sec. 290.)

Having taken this view of the case it becomes unnecessary to consider many other questions raised by counsel, and the only matter remaining to be considered is the disposition of the assets, and the payment of the debts of the firm.

At the time of entering into the copartnership the firm of Ben. Holladay & Co., in consideration of the transfer to it of the property of A. J. Cook & Co., agreed to pay the indebtedness of that company, including a debt due to the appellant, then estimated at twenty-one thousand dollars. Some time after the formation of the copartnership, Ben. Holiday & Co. gave the appellant a written instrument to this effect, which was antedated so as to conform to the date of the agreement. It is as follows:

OFFICE BEN HOLLADAY & Co.,
PORTLAND, Oregon, September 12, 1868. {

S. G. ELLIOTT, Portland—Dear Sir: On our purchase this date from A. J. Cook and A. J. Cook & Co. of the pending contracts with the Oregon Central Railroad Co. for the construction of a railroad from Portland to the California line, it is understood that we are to pay you the money furnished by you to the firm of A. J. Cook & Co., and standing to your credit on their books. This money is stated by you to amount to about twenty-one thousand dollars. When the accounts are fully made up and the balance correctly ascertained, you will be entitled to our obligation for the correct amount. Respectfully yours,

BEN HOLLADAY & Co.

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This writing was accepted by the appellant, and the question now to be determined is how much, if anything, there is due upon it by the firm of Ben Holladay & Co. to the appellant. The respondents contend that there is nothing due to him, and so it was found by the referee. We think, however, that he erred in his findings of fact in regard to this indebtedness. The basis of the referee's finding was a statement of what purported to be the account of S. G. Elliott with A. J. Cook & Co., amounting to sixty-four thousand one hundred and nine dollars and eighty-two cents, which was made out by a Mr. Cushman for Judge Shattuck, and offered in evidence by the attorney for respondents. The appellant at the time protested that this was not a correct account from the books of A. J. Cook & Co., and we are satisfied it was not. Mr. Cunningham, the book-keeper of Ben Holladay & Co., testified that there had been expended up to the twelfth day of September, 1868, the sum of seventy-two thousand four hundred and ninety-six dollars and fifty-eight cents. The appellant claims that the books of A. J. Cook & Co., as made up by Mr. Harriman, show that the amount of his account against that firm was eighty-one thousand four hundred and fifty-five dollars and thirty-one cents. These books are not in evidence, and we have not even a transcript of the account before us. Mr. Holladay, in his testimony, states that the firm of Ben. Holladay & Co. agreed to pay the appellant the amount which the books of A. J. Cook & Co. would show that he had expended for that firm. Soon after the formation of the copartnership, Mr. Holladay employed Mr. Harriman, a competent book-keeper and accountant, and sent him from San Francisco to Portland to adjust the account of the appellant with A. J. Cook & Co. This duty was performed in the fall of 1868, and Mr. Harriman died soon after and before his deposition could be taken. It must be presumed when he made a statement of the account that it was a full and correct one; and that he took into consideration and passed upon the several items which the referee charged against the appellant in his fifty-first finding. From the best evidence before us we are satisfied that Mr. Harriman found the amount of twenty-one

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thousand dollars to be due to the appellant, and that he is now entitled to that sum, less the amount which was paid to him by Ben. Holladay & Co.

In his evidence, Mr. Holladay states that at various times the firm of Ben Holladay & Co. paid to the appellant, on account of this indebtedness, sums amounting to about nine thousand dollars. The appellant, on the other hand, says he received only six thousand two hundred and ninety-nine dollars and sixty cents. However, in an amended answer which he proposed to file in this suit, and which was sworn to by him on June 1, 1871, he denied that any part of this sum of twenty-one thousand dollars had been paid by the firm of Ben Holladay & Co., except the sum of about eight thousand dollars. This admission under oath must be taken against him. Deducting that sum from twenty-one thousand dollars leaves twelve thousand dollars, and interest thereon since September 12, 1868, due to the appellant from the firm of Ben Holladay & Co.

At the time this suit for a dissolution of the copartnership was commenced, the assets of the firm of Ben Holladay & Co. consisted in part of a section of twenty miles of railroad, then nearly completed. By the terms of the contract entered into between the O. C. R. R. Co. and A. J. Cook & Co., the latter firm was to receive thirty-two thousand dollars per mile for the construction and equipment of that portion of the road, or six hundred and forty thousand dollars for the twenty miles. This sum was to be paid to the firm of Ben Holladay & Co. under the contract of A. J. Cook & Co., in bonds of the O. C. R. R. Co., which we consider were of no value for reasons already stated. That corporation, however, having no lawful organization, the respondents appropriated and converted that section of the railroad to their own use and benefit, and subsequently sold it to the Oregon and California railroad company, a new corporation organized to complete it.

The amount of money necessarily expended in constructing that section of the road can not be satisfactorily ascertained from the evidence in the case. On this point it is meager and uncertain, and the statements of the parties

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differ very widely. The appellant places it at four hundred and twelve thousand three hundred and eight dollars, including the sum of eighty-one thousand four hundred and fifty-five dollars paid out by A. J. Cook & Co. prior to September 12, 1868, while on the part of the respondents the book-keeper of Ben Holladay & Co. states that they paid out six hundred and sixty-eight thousand nine hundred and ninety-one dollars from September 12, 1868, to December 24, 1869, in completing that section of twenty miles. This sum is given by him as the aggregate of the expenditures taken from the books of the firm. The items of the account are not set forth, and we can not, therefore, determine whether the whole amount is properly chargeable for building the road or not. The referee found that the total amount paid out by the firm of Ben Holladay & Co. in the construction of the road, exclusive of the sum paid to the creditors of A. J. Cook & Co., was five hundred and ninety-six thousand five hundred and ten dollars, but he did not say whether all of it was expended upon the first section of twenty miles, or whether part of it was paid out for work done on the road between that section and Salem.

Inasmuch as the respondents appropriated that section of the road, as well as all the work on the other portions, to their own use, without the consent of the appellant, it may be fairly presumed that it was worth to them what it cost to construct it, including not only what they paid out upon it, but also the unpaid balance of twelve thousand dollars which A. J. Cook & Co. had expended upon it, and which Ben Holladay & Co. assumed to pay to the appellant when the copartnership was formed. Having terminated that copartnership, and excluded the appellant from any participation in the settlement of its affairs and the disposal of its assets, the respondents should be held liable to pay the debts of the firm, as well as those due to themselves, as the amount due to the appellant.

Beside the railroad property belonging to Ben Holladay & Co., that firm had the machine shops, saw-mills, wagons, carts, horses, etc., which the respondents also appropriated to their own use, and subsequently transferred to the O. &

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C. R. R. Co. There is no evidence as to the value of the machine shops at the time the respondents terminated the copartnership, but, judging from the prices paid for the machinery in Boston by A. J. Cook & Co., the freight, insurance, expenses of putting up the buildings, etc., the value of the machine shops may fairly be estimated at twelve thousand dollars. The book-keeper of the firm testified that Ben Holladay & Co., at the commencement of this suit, had three mills, carts, horses, wagons, picks, and shovels and office furniture worth probably seven thousand five hundred dollars. Of all this property, amounting in the aggregate to nineteen thousand five hundred dollars, the appellant was entitled to four fourtieths or one tenth, that being the interest which he had in the copartnership at the time this suit was commenced, making his share therein the sum of one thousand nine hundred and fifty dollars.

We will now proceed to consider the claim of Ben Holladay & Co. to the lands granted by congress to aid in the construction of the O. C. R. R. In law that firm had no title to any of these lands, yet in equity it was entitled to them. All these lands were earned by the money and labor of Ben Holladay & Co., and were in fact afterwards transferred to the O. & C. R. R. Co., and whatever may be realized by the sale must in equity be regarded as part of the assets of that firm, and although the partnership was terminated by the respondents before the lands for the first section were fully earned, yet they will not be permitted to exclude the appellant from his rightful share in the lands by effecting a dissolution of the copartnership a few weeks before the title to them became perfected.

Nearly all the valuable lands embraced within the limits of the railroad grant for the first twenty miles had already been disposed of by the United States government before the grant was made, and the testimony of the agent employed to select and sell the railroad lands shows that up to September, 1875, there had been selected and patented to the O. & C. R. R. Co., for the first section of twenty miles, thirty-two thousand two hundred and sixty-seven and thirty-six hundredths acres, and about the same number of

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acres more could be selected whenever the surveys should be made. These lands he estimated to be worth in the aggregate about twenty-five cents per acre, and taking into consideration their inferior quality, their remoteness from market, the taxes to be paid on them, and the expenses of the selection and sale, we think his estimate of their value is not an unfair one, and that all the lands, patented and unpatented, amounting to about sixty-four thousand five hundred and thirty-four acres, were worth sixteen thousand one hundred and thirty-three dollars, of which sum the appellant ought to have the one tenth, or one thousand six hundred and thirteen dollars.

We therefore consider that upon a fair settlement of the partnership transactions the respondents are justly indebted to the appellant in the following sums: Balance of A. J. Cook & Co., indebtedness unpaid by Ben Holladay & Co., twelve thousand dollars; interest since September 12, 1868, thirteen thousand dollars; appellant's interest in machine shops, saw-mills, etc., one thousand nine hundred and fifty dollars; interest since November 5, 1869, one thousand eight hundred and eighty-six dollars; equitable share in land grant, one thousand six hundred and thirteen dollars; eight years' interest on same, one thousand two hundred and eighty dollars; total, thirty-one thousand seven hundred and twenty-nine dollars.

Of this sum the respondents should pay in proportion to the interest which they had respectively in the copartnership of Ben Holladay & Co.; that is, respondent Holladay is to pay twenty-four parts, or twenty-two thousand four hundred dollars, and respondent Emmett ten parts, or nine thousand three hundred and twenty-nine dollars.

It is therefore ordered and decreed by the court that the copartnership of Ben Holladay & Co. be dissolved, and that the appellant, Simon G. Elliott, have and recover from the respondent Ben Holladay the sum of twenty-two thousand four hundred dollars, and that he also have and recover from the respondent C. Temple Emmett the sum of nine thousand three hundred and twenty-nine dollars.

[Upon a rehearing in this suit, had at the same term, the

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above decree was so modified as to require Holladay to pay twenty thousand six hundred and thirty-three dollars instead of twenty-two thousand four hundred dollars, and Emmett eight thousand five hundred and ninety-six dollars instead of nine thousand three hundred and twenty-nine dollars.
REP.]

8	100
9	525
10	478
10	479
16	329
14*	70

**JOHN P. SMITH, RESPONDENT, v. MARGARET SMITH,
APPELLANT.**

MARRIAGE CONTRACT — FRAUDULENT CONCEALMENTS AT TIME OF.—Where a woman before marriage conceals from her intended husband the fact that she had some time before been the mother of an illegitimate child, such concealment is not such a fraud as will annul the marriage.

GROUND FOR DIVORCE—FALSE ACCUSATION OF UNCHASTITY.—If a husband or wife either falsely accuse the other of unchastity, such accusation is a sufficient cause for a divorce.

APPEAL from Linn County.

This is a suit by the respondent against the appellant for divorce upon two grounds: 1. Fraudulent representations by the appellant relied upon by the respondent at the time of the marriage to the effect that she had always led a chaste life, while in fact she had prior to such time given birth to an illegitimate child; 2. Cruel and inhuman treatment, by falsely charging the respondent in the presence of others of the crime of adultery with his daughter-in-law.

The allegations relied upon by the respondent were denied by the appellant, except that which related to the fact that the appellant had given birth to an illegitimate child before the marriage. The court granted a decree of divorce.

C. E. Wolverton and N. B. Humphrey, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

The appellant claims that the first count of the complaint which alleges that the appellant was guilty of fraud and false representations or concealments of her real char-

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acter, and thereby induced the respondent to contract the marriage, does not state sufficient facts to constitute a cause of suit.

The allegations of the complaint referred to as charging fraud are, that the appellant before the marriage represented herself as having been always a chaste and virtuous woman, and that by reason of these representations the respondent was induced to contract the marriage, and that these representations were false. These allegations being denied, and proof having been taken thereof, we think the evidence fails to show that such representations were made and that the appellant did nothing more than conceal from her intended husband that she had been the mother of an illegitimate child some years before. We think the mere fact of this concealment is not such a fraud as would be a sufficient cause for annulling the marriage. It therefore becomes unnecessary to pass on the question as to whether the allegations in this part of the complaint are sufficient to constitute a cause of divorce, for these allegations are not proven by the evidence.

The appellant also claims that the part of the complaint charging cruelty is not sufficient to constitute a cause of suit. The charge is that the appellant since the marriage has falsely charged the respondent with the crime of adultery with his daughter-in-law. Such an accusation by either the husband or wife against the other has often been held sufficient cause for a divorce, and many divorces have been granted for such causes, and it is now the settled law of this state that such accusation is sufficient cause for a divorce. But while counsel for the appellant concede that this accusation may be sufficient in some cases, they still claim that it is not sufficient in this case, because these accusations were made after the parties were separated and had ceased to live together as husband and wife. We think this makes no difference, for neither a husband nor wife can claim a right to continue the marriage relation while falsely charging the other with unchastity. No domestic happiness or peace can be expected to exist between parties thus falsely criminating each other.

Argument for Appellant.

The only question then is, Were the charges made? On this subject there is no doubt, for the appellant alleges the charge in her answer, but offers no evidence even tending to prove it. We think, therefore, that the respondent has made out his case on this part of the complaint, and is entitled to a divorce.

The decree of the circuit court will therefore be affirmed with costs.

8 102
8 265
8 270
9 237

**DOUGLAS COUNTY ROAD COMPANY, RESPONDENTS,
v. CANYONVILLE AND GALESVILLE ROAD COMPANY,
APPELLANTS.**

PUBLIC ROAD—COUNTY COURT MAY MAKE AGREEMENT FOR APPROPRIATION BY PRIVATE CORPORATION.—A corporation, having been organized to construct a road, located a portion of its road upon a public road, but made no application to the county court to agree upon the extent, terms, and conditions upon which such public road might be used, as provided in section 26 of the corporation law. Afterwards another corporation was organized to construct a road, and made an agreement with the county court as to the extent, terms, and conditions upon which the public road might be appropriated by the corporation as a part of its road. *Held*, that such agreement was valid, and that the corporation first organized had not the exclusive right to contract with the county court for the use and appropriation of the public road, although it first surveyed and located the line of its road on the public highway. *Per* Mr. Justice Boise, dissenting: A road corporation may, when it is necessary and convenient, locate its road on the county road, whether the county court assent to it or not, and having done so, the right becomes property of which the corporation can not be deprived by the county court. The assent of the county court is only necessary to the right to collect tolls upon the road appropriated.

APPEAL from Jackson County. The facts are stated in the opinion.

W. R. Willis and R. S. Strahan, for appellant:

A corporation formed for constructing a road, by surveying, locating, and adopting its line of road, acquires the right to acquire or appropriate land, right of way, public roads, etc., necessary for its purposes. And this right is property. (See Abb. Dig. Law of Corp. 585, sec. 13; 7 Met. 78; 3 Cush. 91, 106; 4 Id. 467; 1 Gray, 340, 360; 16

Argument for Respondent.

Curtis U. S. R. 793, 805; Civ. Code, 529, 530, secs. 23, 26; 23 Cal. 324.) When one corporation has acquired this right, no other person or corporation can acquire the same right to the same lands, etc., so as to interfere with the former company. (16 Curtis, 793, 801, 811; Abb. Dig. Law of Corp. 626, sec. 239; 10 Pick. 270; 54 Barb. 389, 390; 1 Gray, 1, 36, 37; 4 Id. 474; 13 Cal. 520; 23 Id. 324, 331.)

The appellant had surveyed, located, and adopted its line of road, and completed about five miles of it, before the respondent was organized. If a corporation does not have the right to appropriate, the county court has no authority or jurisdiction to agree with it to appropriate a public road, under section 26, page 530 of Misc. Laws; and such jurisdiction must affirmatively appear on the face of the record of such proceedings. (16 U. S. Annual Dig. 171, 621, secs. 5, 40, 41; 19 Id. 157, sec. 27; 4 Zabr. (N. J.) 547; 2 Or. 34-40.) The word "appropriate," used in sections 24 and 26, page 530, Misc. Laws, does not refer to the right to acquire lands or the use of the public highway, but to the final appropriation. (Misc. Laws, 529, 530, 533, 534, 535, secs. 23, 24, 26, 28, 40, 47, 52.)

There being no time fixed in the agreement between the county court and the respondent, during which the agreement is to continue in force, either party can terminate it at pleasure. (Fry on Specific Performance, sec. 43, 222-230; 7 U. S. Dig. 172, subd. 191; 39 Wis. 562.)

John M. Thompson and J. F. Gazley, for respondent:

No corporation has the power or legal right to appropriate a highway by user, without in the first place attempting to make an agreement with the county court. (5 Or. 322; Misc. Laws, 530, sec. 26.) The agreement between the respondent and Douglas county was binding on Douglas county, and duly made. (6 Or. 300.)

Generally, as a contract can be made only by the mutual consent of all the contracting parties, it can only be rescinded by the consent of all. (2 Parsons on Con. 677.) The statute fixes the time the agreement is to run, which is at least ten years. (Misc. Laws, 533, sec. 38.)

Opinion of the Court—Kelly, C. J.

By the Court, KELLY, C. J.:

The subject matter of this controversy in one shape or another, has been several times before this court, and certain points of law and questions of fact have been settled by its decisions, which can not any longer be considered as open to controversy. These matters, so far as they are *res judicata*, will be referred to hereafter. The matter especially in contention between the parties is, as to which of the corporations, the respondent or the appellant, is entitled to establish a toll gate and collect tolls on the road running through what is known as the Big canyon in Canyonville and Cow creek precincts in Douglas county.

In 1853, a military road was laid out, under Major Alvord, by Jesse Applegate on substantially the same ground as that now occupied by the road in controversy; and on the sixteenth of January, 1854, the legislative assembly of Oregon territory, by an act passed that day, enacted "that the military road from Myrtle creek in Douglas county to Jacksonville, Jackson county, be and the same is hereby declared a territorial road."

By an act of the legislative assembly, approved October 29, 1860, all territorial roads in this state were declared to be county roads, and by the act of January 17, 1861, were placed under the supervision of the county court. In the case of *Douglas County Road Company v. Abraham et al.* (5 Or. 319), this court decided that the same road referred to in this suit, having been used continuously for twenty-five years by the public, it became a public highway by continued and uninterrupted use. There can, therefore, be no doubt that this road, in August, 1873, when the corporate appellant was organized, was a county road, and under the supervision of the county court of Douglas county. In September, 1873, soon after its incorporation, the appellant employed J. W. Webber to survey and locate its road through the Big canyon, and it is admitted that the line of survey was along and on the county road with some slight deviations, which are of no importance in the consideration of this case. In December, 1873, the Douglas County Road

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Company, the respondent, was duly incorporated to construct a plank and clay road through the Big canyon, commencing at the southwest quarter of the northeast quarter of section 34, T. 30 S., R. 5 W., running thence in a southerly direction and terminating at a point where the military wagon road crossed the south line of section 2, in T. 32 S., R. 5 W.

It is admitted that the line of this road which passed through the Big canyon, is along and upon the county road and substantially over the same route as that surveyed in September, 1873, by the appellant, for its road. On the tenth of April, 1874, the respondent entered into an agreement with the county court for the appropriation, use, and occupation of the road in controversy. In this agreement it was stipulated that the respondent should have the right to collect certain tolls from persons traveling over the road; and in consideration of this privilege the respondent covenanted to bridge the streams, and to keep the highway in good condition for the public travel.

The following are the sections of the law under which the agreement was made: "Where it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used and occupied by such corporations, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of said road." (Misc. Laws, 530, sec. 26.) "Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 26, such corporation may place such gates thereon, and charge and receive such tolls thereat, as such local authorities may consent to, by such agreement, and none other." * * * (Id. sec. 28.)

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The agreement between the county court and the respondent before referred to was filed in the office of the county clerk but was not entered in the journal of the court, and for this want of record, it is held by the majority of this court that it was ineffectual and inadmissible as evidence in other courts until it was entered upon the records of the county court. And it was only after protracted litigation and through the mandatory power of this court that it was finally, on the thirty-first day of May, 1870, entered upon the journal of the county court. It is unnecessary here to refer to the history of this litigation. It is fully set forth in the opinion of the supreme court in the case of *The Douglas County Road Company v. The County of Douglas*, 6 Or. 300. It must now be considered as conclusively settled, so far as this court can settle anything by its adjudications, that the agreement entered into between the county court of Douglas county and the respondent, on the tenth day of April, 1874, was a valid contract, binding and conclusive between the parties to it. This matter is no longer open to controversy. But the appellant claims that as it was not a party to any of the litigation heretofore had concerning this contract, it is not bound by the decision of the court in reference to it, and it asserts that so far as its rights are concerned, that contract was a nullity. The appellant claims that in the location of its road in September, 1873, it was necessary and convenient for it to appropriate a part of the public highway running through the canyon, and that having surveyed and located its line of road along the county road before the incorporation of the Douglas County Road Company, it had the exclusive right to appropriate the county road as a part of its own road, and that it alone had the right by virtue of its first survey and location to enter into an agreement with the county court for the purpose of making and keeping the road in repair, and charging toll to persons passing over it.

The appellant had a right under the law in relation to corporations, to enter upon any lands between the termini of its road for the purpose of examining, surveying, and locating the line of it, and to appropriate a strip of land not

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exceeding sixty feet in width for its road where the lands belong to private individuals. And it had also the right, in case it could not agree with the owners thereof as to the compensation to be paid therefor, to maintain an action against such owner, to have the value assessed and the land condemned and appropriated to its own exclusive use. And we think that if the appellant entered upon, surveyed, and selected any land for its road, which belonged to private persons, it had the exclusive right from the time of such survey and selection to appropriate the same, and that the respondent could not in any way interfere with such right, nor construct its road upon any such lands. But it does not follow that, by surveying a public highway, and making it a part of its corporate road, the appellant thereby acquired the right to appropriate the same to its exclusive benefit; nor does it follow that the respondent had no right to use such public road as a part of its corporate road, in the same manner as the appellant. The statute contemplates that in the construction of a road by a corporation, it may sometimes be necessary or convenient to use part of a highway, as where it passed through a defile, or where it is difficult to construct a road along side of the public highway, and in such cases it is provided that the public road, or so much thereof as may be necessary and convenient, may be used, or, in the words of the statute, "may be appropriated by the corporation." The road appropriated, is not, however, to be here understood in the same sense as in the appropriation of lands belonging to private individuals where the corporation becomes entitled to the property. By the appropriation of part of a highway, the corporation acquires no right except to use the public road in common with all others traveling upon it, unless it makes an agreement with the county court as provided in section twenty-six, above quoted. This section of the statute does not provide that any part of a public road "may be appropriated, or used and occupied," by only one corporation; nor that the first one which so uses and occupies it, or which first surveys it, shall have any exclusive privileges over any other corporation which may

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subsequently be organized. And we think it would be unwise and impolitic to construe the statute so as to confer exclusive benefits upon one corporation and exclude all others from the right to compete for the public travel on the public highways.

The old doctrine was, that when a grant of a franchise to construct a road, to build a bridge, or to keep a ferry, was made to a person or corporation, it was an exclusive privilege, with which no other person or corporation could interfere by competition so as to lessen the profits of the first grantee. But this subject was thoroughly discussed in the case of *Charles River Bridge v. Warren Bridge* (11 Pet. 421); and the right of exclusive franchises of this kind in favor of the first grantee, was completely overthrown. (*Indian Canyon Road Co. v. Robinson*, 13 Cal. 519.)

If we were to give the construction to the statute contended for, then the appellant, having first surveyed and selected the part of the county road through the Big Canyon, could virtually fix its own rate of tolls for traveling over the road, and the county court would either have to make a contract acceding to its demands, or suffer the road to become impassable for the want of necessary repairs. If the county court should make no agreement, the appellant could nevertheless appropriate and use the road, while it would be under no obligations to make any repairs upon it, and could refuse to do so until necessity would compel the court to yield to the terms demanded. We do not say that this would have been the case, but it might have been, and we should not give such a construction to the law as would place it in the power of any corporation to exact its own terms for the use of the public roads of the state. We ought to construe it for the public good, rather than private gain, or as conferring exclusive privileges upon any corporation. And this can only be done by inviting competition, and by authorizing the county court to confer the privilege of taking tolls on that corporation which will make the less onerous exactions on the traveling public.

Although the appellant caused a survey and location of its road to be made in September, 1873, yet from that time

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until February 8, 1875, it made no application to the county court to enter into a contract to construct and keep in repair the public road leading through the canyon, and for the privilege of collecting tolls therefrom. Indeed, the evidence shows that during all that time, the appellant refused to recognize the existence of any public road through the canyon, and all the money expended by it in the construction of the road was for the purpose of making a corporate road, rather than to improve the public highway. Under these circumstances, the county court had a right to enter into the agreement of April 10, 1874. That agreement this court has heretofore held to be a valid and binding contract, and we can not now question the correctness of its decisions upon this point.

It is claimed by the appellant that on the fifteenth day of January, 1878, the county court of Douglas county revoked and annulled the agreement entered into by it with the respondent. It is hardly necessary to call any authority to show that this attempted revocation, without due process of law, amounted to nothing.

The circuit court rendered a decree in favor of the respondent for seven thousand dollars damages, sustained by reason of the wrongful acts of the appellant in collecting toll from February, 1875, to May, 1877. This we think was erroneous. At the December term, 1874, this court, by its decree, adjudged that the agreement of April 10, 1874, was ineffectual as a contract, because it was not entered upon the journal of the county court. And until it was so entered, the respondent refrained from collecting tolls from persons traveling on the road. If it could not lawfully collect these tolls from travelers, then neither has it a right to recover them from the appellant now, even though it wrongfully received them from persons traveling on the road. The contract was not entered on the county record until May 31, 1878, but a few days before the amended complaint was filed, and the respondent was not, therefore, entitled to recover anything in this suit for the unlawful collection of tolls by the appellant. With this exception, the decree of the court below is affirmed.

Decree modified.

Opinion of Boise, J., dissenting.

Mr. Justice Boise, dissenting:

In this case, I have not been able to agree with a majority of the court in their conclusions that the decree in this case should be affirmed.

It appears from the evidence that the appellant in August, 1873, became an organized corporation by electing directors, and soon thereafter caused their road through the canyon to be laid out, surveyed, and located, which survey was adopted by the board of directors as their location of said road, and said company commenced constructing their road on such location, and had made considerable progress therein, before the Douglas County Road Company was organized. After the appellant was organized and had located the line of their road, the respondent also organized and located a road over substantially the same route, for it is evident from the testimony that there is but one route through the canyon for a road. And the first question in the case is, Had the appellant acquired by this location such an interest in the route and that part of the county road before constructed through the canyon that it could legally maintain the right of way over said county road, and hold it against the alleged rights of the respondent acquired through its contract with the county court of Douglas county?

The statute (Misc. Laws, 529, sec. 23) provides generally, "that a corporation organized to construct a road, shall have the right to appropriate the lands over which it may be located," and section 26 provides "that such corporation may appropriate such parts of any county road as shall be necessary and convenient in the construction of such road."

In the first instance, where the lands of private persons are taken, the statute points out how compensation shall be made to owners of lands so taken, for damages sustained by them in locating the road over their lands. In the case where a county road is appropriated, the county court can agree with the corporation on the terms on which said county road may be used by the corporation. But if the

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county court and the corporation can not agree, then the corporation may appropriate so much of said county road as may be necessary and convenient in the location and construction of said corporate road.

Section 28 provides "that when such public highway (or county road) is taken by agreement with the county court, such corporation may place such gates thereon and charge such tolls thereat as the county court shall consent to in such agreement, and none other."

So it appears from these provisions of the statute that the corporation has the right on the location of its line of road to appropriate a county road where necessary and convenient, whether the county court assent to it or not, but have no right to charge tolls on such county road unless the same be allowed by an agreement with the county court; and the object of this agreement with the county court would seem to be to obtain the right to collect tolls on the roads so far appropriated; for the county court has no power to prevent the corporation from using such county road, and their using the same for the purposes of travel would be no public injury, and the rights of the public are protected by the inhibition of the corporation from collecting tolls on such portions of the county road as are taken and used on the line of the corporate road, unless the same are allowed to be collected by an agreement with the county court.

I think, therefore, that the appellant, having first established its line of road through the canyon, acquired thereby the prior right to appropriate this county road, and that this right was property of which they could not be deprived by the action of the county court. That is, that the appellant had the same right to locate its road on this county road as it had to locate it over the lands of private persons, and that the only object in making an agreement with the county court was to obtain the privilege of putting a gate on such county road and collecting tolls.

These are rival corporations, each seeking to secure the right to construct a road over substantially the same route, and I think that the one that was first in time in organizing

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and locating the route, thereby appropriated it to the exclusion of one less expeditious. It has been held in Maryland, in the case of the *Chesapeake Canal Co. v. Ohio R. R. Co.*, 4 Gill & J. 1, that the right to select and acquire land for the authorized purposes of a corporation is property. It is an incorporeal hereditament, not a legal title to the land itself, nor a mere capacity or faculty to acquire land, such as every individual possesses, but a right or privilege to acquire that right in the land necessary to the enjoyment of the franchise. And no corporation, after the previous grant of such right to another, can legally acquire any such right of way over or title to the land over which the franchise extends, as will hinder the corporation first acquiring the right from the enjoyment of its franchise; and the same doctrine is announced in the case of *West Bridge Co. v. Dix*, 16 Curtis, 802; in Massachusetts in the *Charleston Branch R. R. Co. v. County of Middlesex*, 7 Met. 78; and in the case of *Boston Bridge Petitioners v. County of Middlesex*, 10 Pick. 269; Abb. Dig. Law of Corp. 626, sec. 239. I think, therefore, that the Canyonville and Galesville Road Co. are first in time and first in right in securing their franchise.

It is claimed that the appellant lost its right to appropriate this county road by not making application for an agreement with the county court of Douglas county before respondent made an agreement with such court giving to respondent the right to use said county road.

This may be answered by an illustration: Suppose that after the appellant had organized and proceeded to locate the line of its road, the same crossed the land of a private person; and the respondent, having subsequently organized, had proceeded to such private person and by agreement with him got the right of way, while the appellant was diligently pursuing the business of its location, but before it had reached that part of the line over the land of such private person; such purchase would not defeat the right of appellant to proceed and appropriate the land for the use of his former acquired right of way over it, and I think the same principle applies to the appropriation of a

Argument for Appellants.

county road. It was first necessary for the corporation to locate the line of its road before it could know how much and what part of said county road it would be necessary and convenient to appropriate. I do not think that the decision of this court in a former case, affirming the order of the circuit court to enter *nunc pro tunc* an order made by the county court of Douglas county on its records, in any way settles or determines the right of appellant under its corporate privileges. These rights were not litigated in that case.

THE STATE OF OREGON, RESPONDENT, *v.* J. H. McDONALD AND WILLIAM BELL, APPELLANTS.

WITNESS—IMPEACHING QUESTION.—In a prosecution upon an indictment for larceny, the prosecuting witness was asked the following question by defendant's counsel: "Between the time you lost your money and the time you went out to Forest Grove, was you not on the streets of the city of Portland with L. Besser, chief of police, looking for the men that got your money, and did you not see McDonald, one of defendants, and did not L. Besser point out McDonald to you, and ask you if he was the man that got your money?" *Held*, that the question did not relate the circumstances of time, place, and persons present, so as to entitle the defendant to impeach the witness.

DISCRETION OF THE COURT.—A motion for a new trial, based upon matters *dehors* the record, is addressed to the sound discretion of the court, and will not be reviewed on appeal.

OBJECTIONS TO A JUROR on the ground of incompetency are waived by failing to challenge at the proper time.

APPEAL from Multnomah County. The facts are stated in the opinion.

George W. Yocum and Francis Clarno, for appellants:

Our statute, page 274, sections 830, 831, has provided how a witness may be impeached, and this is nothing more than the common law rule. (1 Greenl. Ev., sec. 462, and note 1, and cases cited in note 1.) This rule is adopted by our statute, as the rule is not uniform in all the states. (2 Graham and Waterman, N. Tr. 665, 613.)

We insist the foundation was fully and fairly laid to impeach Wallace, and if Besser and Daniels had been allowed

8	113
10	152
10	400
8	113
24	70
32	1034
8	113
133	40
33	152
8	113
37	88
8	113
89	96

Argument for Appellants.

to testify, the corrupt and false testimony of Wallace would have been overthrown.

In many of the states a witness may be impeached without first inquiring of the witness if he has not made contradictory statements to other persons at other times and places. (*Tucker v. Welsh*, 17 Mass. 160, 164; *Titus v. Ash*, 4 Foster, N. H., 319; *Hedge v. Claggs*, 22 Conn. 622; *Robinson v. Hutchinson*, 31 Vt. 443; 9 *Cush.* 338; 3 *Gray*, 463; 2 *Phillips Ev.* 774.)

Here is the authority of four respectable states holding that a foundation to impeach need not be laid, and also the authority of one respectable text-writer, and the reasons given for not apprising a witness of your intention to impeach him, are equally as cogent as those given in favor of the rule. But we are nevertheless bound by the rule prescribed by our statute; yet the spirit of the statute and the object to be attained must be kept steadily in view. The witness must have a fair chance, his attention must be called to the conversation, time, place, and person. This was done.

Was W. L. Higgins a competent juror, or did defendants waive their objections by failing to challenge him? It is conclusively shown by the affidavits of defendants and the affidavit of Higgins, the juror, that he was not born a citizen of the United States. There is no evidence showing that Higgins ever was naturalized. The affidavit of Higgins is not competent to prove the judgment of a court of record, and besides all this, his affidavit is indefinite, and does not state what court he was naturalized in, likely before a justice of the peace. The affidavit of Higgins is a declaration that he is not a citizen of the United States. It might be competent evidence to enable him to vote at an election where the statute of the state expressly makes the oath or affidavit of a person sufficient. (2 *Graham & Waterman*, N. Tr., 2 ed., 189, note 2; 1 *Greenl. Ev.* sec. 86.)

Did the defendant waive the objection to the competency of this juror by failing to challenge him? Under section 182 (Code, page 142), subdivision 2, a defendant may challenge a juror for "a want of any of the qualifications pre-

Argument for the State.

scribed by law." The defendants might have challenged the juror, but the state put them on trial, and was bound to give them a competent panel. (2 Graham and Wat. N. Tr. 187, 277; 6 Johns. 332; *Geykowsky v. The People*, 1 Scam. 476; *State v. Babcock*, 1 Conn. 401; *Borst v. Becker*, 6 Johns. 332; *Judgon v. Eslava, Minor (Alabama)*, 2; *Hillard on N. Tr.* 87, sec. 6; *Seal v. The State*, 13 S. & M., Miss. 398; *Burnshill v. Giles*, 9 Bing. 13.)

J. F. Caples, District Attorney, and M. F. Mulkey, for the State:

Our code expressly provides that before a witness can be impeached by showing that he has made inconsistent statements, such statements must be related to him with the circumstances of times, places, and persons present. We claim that this was not done, and the foundation required by the statute was not laid. "Before this can be done," the circumstances of times, places, and persons present must be related to the witness as well as the statements. It is not enough to ask the witness the general question whether he has ever made such statements, but his attention must be called to the particular circumstances of time, place, and persons present, so that he may recollect, and if he does recollect, so that he may explain or rebut. This is the common law rule, and the rule of our statute, and is fair and right, due to the witness, and not unjust to the defendants. (Civ. Code, 274, sec. 831; 1 Greenl. on Ev., 10 ed., sec. 462, and note 1; 16 Cal. 177; 33 Id. 522; 44 Id. 457.) They do not attempt to fix the time nor the place. They say between "the time you lost your money and when you went to Forest Grove." This includes the first, second, and third days of January, and calls the attention of the witness to no particular time or circumstance of time. They say on the streets of Portland, but do not call the attention of the witness to any particular street, corner, or block. "When you and Besser were on the streets of the city of Portland looking for the men who got your money," does not call the witness' attention to any circumstance of time or place, for they might have been and

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in fact were upon many streets on different days, that is, on the first, second, and third of January, looking for the defendants. It is objected that Higgins, one of the jurors, was not a citizen; this is not true. It appears from the record that he was a citizen; he swears that he is a citizen, and there is no competent evidence to contradict this statement.

But it was for the defendants to ascertain that he was not a citizen, if that were so, by proper examination, and having neglected to do so, the verdict in this case will not be disturbed. If Higgins was an alien they could ascertain that before as well as after trial, otherwise they could allow an alien to sit for the purpose of defeating justice. (Proffatt on Jury Trial, sec. 172; *Chase v. People*, 40 Ill. 352.)

By the Court, PRIM, J.:

This is an appeal from a judgment in a criminal case. The appellants were jointly indicted for the crime of larceny for stealing five hundred dollars from S. R. Wallace by means of a fraudulent trick or device called the Kentucky Lottery. They were jointly tried, convicted, and sentenced to the penitentiary for the term of ten years.

The appellants sought to impeach the witness Wallace by showing that he had made at another time statements inconsistent with his testimony on the trial, and to lay the foundation for this, asked him the following question: "Between the time you lost your money and the time you went out to Forest Grove, were you not on the streets of the city of Portland, with L. Besser, Chief of Police, looking for the men that got your money, and did you not see McDonald, one of the defendants, on the street, and did not L. Besser point McDonald out to you and ask you if he was the man that got your money, and did you not then and there say to L. Besser, 'No, he is not the man—he don't look like the man—the man that got my money was of a sandy complexion?' or words to that effect?" And the said Wallace then and there answered said cross-question and said, "No, I never told Besser so, I did not tell Besser that McDonald was not the man that got my money."

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And in the further progress of the trial the appellants introduced said L. Besser, chief of police, as a witness, and offered to prove by him that between the first and third days of January said S. R. Wallace was with L. Besser upon the streets of Portland looking for the men that got his money, and that Besser pointed out to Wallace, McDonald, and asked Wallace if McDonald was not one of the men that got his money; and that said Wallace then and there said, "No, he (McDonald) is not the man—he don't look like the man—the man that got my money was of a sandy complexion." And thereupon the district attorney objected to this evidence by defendants because there was no time or place fixed in the impeaching question, and because there was no foundation laid to contradict the witness, Wallace. The court sustained said objections.

This ruling of the court is assigned as error.

The code provides that "a witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statement must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them." (Code, 274, sec. 831.) This was the common law rule as laid down in Greenleaf and other works on evidence. (1 Greenl. on Ev. 462, note 1.) The question propounded to the witness was indefinite as to the circumstances of time, place, and persons present, and was properly overruled by the court. (16 Cal. 177.)

After conviction, the appellants, by their counsel, filed a motion for a new trial, on the ground that W. L. Higgins, one of the jurors who tried the case, was not a citizen of the United States, and therefore not a competent juror. This motion was based upon the affidavit of McDonald, one of the appellants, to the effect that he had been informed that said Higgins was an alien and had never been naturalized; that said information came to him after the case had been submitted to the jury. The motion was resisted on the affidavit of said Higgins, which is to the effect that he

Points decided.

had been a citizen of Multnomah county in this state for twenty-nine years; that he did not know whether he was born in the United States or not; that at his earliest recollection he was in Newburyport, Mass.; that to prevent any question as to his citizenship, he was naturalized in Boston, Mass., either in 1846 or 1847. He did not recollect which.

The motion for a new trial was overruled, to which ruling of the court the appellants excepted and assign here as error.

This motion, being based upon matters *dehors* the record, was addressed to the sound discretion of the court below and can not be assigned and reviewed on appeal. The code provides that "after hearing the appeal the court must give judgment without regard to the decision of questions which were in the discretion of the court below." (Crim. Code, p. 371, secs. 245-6.) This court has heretofore ruled to this effect in several cases. (*State v. Fithugh*, 2 Or. 228; *State v. Wilson*, 6 Or. 428.)

This is sufficient to dispose of this appeal on this point, but we will further say that, whether Higgins was a competent juror or not, it was too late to make that objection after the trial. It was waived by failing to challenge at the proper time. It was claimed in the argument that this being a criminal case the accused should waive nothing. Upon this proposition they cited *Geyhowski v. The People*, 1 Scam. 476. That case was afterwards overruled and held by the same court not to be good law in the case of *Chase v. The People*, 40 Ill. 354.

Finding no substantial error in the record, the judgment is affirmed.

8 118
8 350

HENRY WARREN, APPELLANT, v. MARY M. HEMBREE, RESPONDENT.

CONSTRUCTION OF WILL—VESTED LEGACY.—A testator made the following bequest: "I give and bequeath to my nephew, F. M. S., one tenth of all my personal property, outside of my real estate, the said one tenth to be given to him when he is twenty-two years of age." *Held*, that F. M. S. took a vested legacy; and that having died before he became twenty-two years of age, his personal representative is entitled to recover the legacy.

Argument for Appellant.

APPEAL from Yamhill County. The facts are stated in the opinion.

H. & A. M. Hurley, for appellant:

Where a legacy is given to a person generally, by express terms, which is to be paid to him at a certain age or upon the happening of a certain event, it will confer such a vested interest in the legatee, that although he should die before the age mentioned, or the happening of the event, his heirs at law or personal representatives would be entitled to the legacy; for the time mentioned in the will is not annexed to the substance of the gift, the legacy, but to the possession, use, and enjoyment of it. (Willard's Eq. Jur. 513; 1 Jarman on Wills, 462; 1 Am. Dec. 97; 9 Id. 605; Dayton on Surrogates, 390.) Where the residue of an estate is first given by the use of language which would, beyond all controversy, confer a vested interest, the subsequent use of expressions of a contrary tendency will not suspend the vesting of the legacy. (1 Jarman on Wills, 648; N. Y. Dig. 2490; 2 Am. Dec. 97; 9 Id. 605.) Where there is language used which renders it uncertain whether the testator intended the legacy to be vested or contingent, the rule is to construe the language most strongly in favor of the vesting of the legacy. (Willard's Equity, 513; 2 Redfield on Wills, 248.)

There is no distinction between the words "to be *given* when he shall arrive at the age of twenty-two," and the words "to be *paid* when he shall arrive at the age of twenty-two years. (2 Redfield on Wills, 232-234.) Where a vested estate is clearly given in the body of the bequest, vague words following are not to be so construed as to render the bequest contingent. (Id. 235.) A bequest to the testator's grandson, "if he shall arrive at the age of twenty-one years, then to be paid over to him by my said executor," was held to be vested and not contingent. (Id. 248.)

The testator intended by the use of the words, "except as hereinafter provided," that his wife should have the use, control, etc., of all his property, except the special legacy provided for in the will. Where two clauses in a will are

Argument for Respondents.

so contradictory and conflicting that force can not be given to both, the first must give way to the second, and force and effect must be given to the second or last clause while the first is to be rejected. (52 N. Y. 12; 9 Id. 113; 1 Jarman on Wills, 293.) The language used in the first sentence in the bequest is: "I give and bequeath to my nephew, Frank M. Shadden, the one tenth part of all my personal property, outside of my real estate." This relates to the present, and expresses an act done by the testator himself.

McCain & Fenton, for respondents:

The language used in the bequest to Shadden, even standing alone, is hardly sufficient to vest the legacy *in praesenti*; it is not the language ordinarily used for that purpose—the language being ambiguous. (Will. Eq. 513, 517; 11 Wend. 259; 6 C. E. Greenl. 326, 26; 49 Me. 159; 21 Pick. 312; 13 Penn. St. 503; 34 Ga. 8; 2 Williams on Executors, 1332, 1353; 2 Redfield on Wills, 168, 172, note 55; 39 Miss. 233; 2 Redfield on Wills, 230, secs. 26, 27.) Where there is an ambiguity in any provision, resort must be had to the remaining provisions for a proper construction. (Willard's Eq. 495.)

It is natural that the first care of the testator should be of his own immediate family. It appears from the will itself that Shadden was a young man not likely to have a family in whom the testator would have an interest in the event of the death of the legatee. These circumstances should be considered in connection with the language used in the will. (Willard's Eq. 493; 2 Redfield on Wills, 245, 250, 252.)

If the construction that the legacy vested *in praesenti*, to take effect in possession when the legatee should arrive at twenty-two years of age, be given, the provision is repugnant to that in favor of the widow. Such repugnancy is to be avoided if possible. (1 Redfield, 245, 250, 252; Jarman on Wills, 396.) If the bequest to Shadden was contingent to vest at twenty-two years old, and to take effect in possession at the marriage or death of the widow, effect is given to all the provisions and the whole instrument is consistent.

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The provision in favor of Frank M. Shadden is in the nature of an exception out of the general bequest to Henry L. Hembree, upon the termination of the present estate vested in Mary M. Hembree. It is so engrafted upon that bequest as to become a part of it, and can no more take effect in possession pending the estate in the widow than can the general bequest to Henry L. Hembree. Hence the inconsistency of the construction claimed by counsel for the appellant, that Shadden was to come into the enjoyment of the legacy at twenty-two years old, when the immediate estate in the widow might not yet be terminated. (24 N. Y. 466.) A vested legacy usually has these characteristics—enjoyment of interest or annuity by legatee, during minority, out of vested fund; a separation of the legacy from the common fund; a direction to a trustee to deliver or pay over to guardian or to the beneficiary, at a time convenient to the estate, the whole amount. (Wigram and O'Hara on Wills, 261.)

In this will none of these distinctive features exist; the fund is entire, no interest is accruing, no new estate is being created, the widow is the sole beneficiary of the whole, with contingent estates to be carved out, at certain times and upon certain events.

By the Court, KELLY, C. J.:

Lycurgus Hembree died on the thirty-first day of March, 1876, leaving a will made on the eighth day of November, 1875. The material portions of the will are as follows: "2. I give and bequeath to my son, Henry L. Hembree, my farm in Lane county, known as the Green B. Rogers donation land claim. 3. I give and bequeath unto my beloved wife, Mary M. Hembree, my town property in the town of McMinnville. 4. It is my will that my beloved wife shall have the use, control and management of all my property, both personal and real, during her natural life, or so long as she shall remain my widow, and then the said property shall all go to my son, Henry L. Hembree, except as hereinafter provided. 5. I give and bequeath to my nephew, Frank M. Shadden, one-tenth of all my personal property

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outside of my real estate. The said one tenth to be given to him when he is twenty-two years of age. 6. It is my will, that in the event my beloved wife and my son, Henry L. Hembree, shall die before my son Henry L. Hembree shall become twenty-one years of age, then it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event so mentioned I do so will the same to him. And it is my will farther in the event just mentioned, the death of my wife and son, that all my personal property shall be equally divided, one half descend to my brother, I. N. Hembree, my sisters, Levina Preston and Susetta Preston, and Elizabeth Montgomery, each to have an equal share; and the other half to my beloved wife's brother and sister, each to have an equal share. It is my will that my son be thoroughly educated as far he will receive an education. 8. I hereby appoint my beloved wife my sole executrix, and it is my desire and will that she be not required to give bonds in administering upon my estate."

This will was admitted to probate on the third day of July, 1876, and Mary M. Hembree, the widow of the testator, was appointed executrix thereof. Frank M. Shadden died on the thirtieth day of September, 1878, and was at the time of his death twenty-one years two months and six days old. Henry Warren was appointed administrator of his estate. Mary M. Hembree, the widow of the testator, is still living and unmarried, and has duly administered the estate, and paid the indebtedness of the decedent, and has on hand twenty thousand dollars subject to distribution.

This suit was brought by the appellant for one tenth of that sum, under the fifth clause of the will, and the only question presented for our consideration is, whether the bequest to Frank M. Shadden was a vested or a contingent legacy. The intention of the testator is always to govern in the construction of his will, and it is to be so construed, if possible, as to harmonize the several provisions and give effect to them all. But in case of doubt or uncertainty as to whether the testator intended to give a vested or contingent legacy, certain rules have been laid down by elementary law writers and by the decisions of courts to govern in the

Opinion of the Court—Kelly, C. J.

construction of the will. Blackstone says: "If a contingent legacy be left to any one, as when he attains, or if he attains the age of twenty-one and dies before that time, it is a lapsed legacy. But a legacy to one to be paid when he attains the age of twenty-one years is a vested legacy; an interest which commences *in praesenti* although *solvendum in futuro*." (2 Bl. Com. 513.) The question in such cases usually is whether the gift and the time of payment are distinct. If they are, then, as each clause in a will is to have some operation, the gift is deemed to be vested at once, and payable at a future time. (O'Hara on the Construction of Wills, 262.)

Tested by the rules here laid down, the bequest to Frank M. Shadden in the fifth clause of the will was clearly a vested legacy, and the words "to be given to him when he is twenty-two years of age," are equivalent in meaning to the words "to be paid to him when," etc., and it is conceded that if the latter phraseology had been used by the testator, the legacy would have vested on his death in the legatee. Other portions of the will tend to show that this was the intention of Lycurgus Hembree, when he made his will. By the sixth clause it appears that he was especially careful to provide how his other property should be disposed of in the event of the death of his wife and son before the latter should become twenty-one years of age, but in regard to the one tenth part bequeathed to Frank M. Shadden, he made no disposition whatever in case of his death, showing clearly, we think, that the testator considered this portion of his estate as finally disposed of and that it would become vested in Shadden as soon as the will should take effect. But it is contended in behalf of respondent that this construction is inconsistent with the provisions contained in the fourth clause, and that the widow is entitled, during her life and widowhood, to the use, control, and management of all the property of the testator, including as well that bequeathed to Shadden as that which was devised to his son. That is not the proper construction to be placed upon this provision of the will. The last words of it, "except as herein provided," exclude the idea that she was

Opinion of the Court—Boise, J.

to have the use and control of all the property of the testator. They except from her control a part of it, and this exception can apply only to that portion bequeathed to Shadden. The widow was entitled to use and control it until he should become twenty-two years of age, when, in the language of the will, it was "to be given to him by the executrix." The decree of the circuit court is reversed and this cause remanded for further proceedings.

8	124
9	55
10	503
18	65
22*	520

8	124
31	445
8	124
38	518
8	124
41	99
41	101
8	124
43	575

R. JACOBS ET AL., APPELLANTS, *v.* ROBERT McCALLEY ET AL., RESPONDENTS.

CHATTTEL MORTGAGE—FORECLOSURE WHERE MORTGAGE PROVIDES MANNER OF.—Where, in a mortgage of chattels, there is a manner provided for foreclosing the same, either party may insist that the foreclosure shall be in the manner provided; but such party must comply with the mortgage stipulation on his part. If the mortgagor insists that the foreclosure be in the manner stipulated, he must, if delivery of possession to the mortgagee is necessary to such foreclosure, deliver the mortgaged property to the mortgagee to enable him to sell the same.

ITEM—A MORTGAGOR MAY SELL or assign mortgaged personal property, subject to the lien of the mortgage.

APPEAL from Linn county.

This is a suit in equity to foreclose a chattel mortgage. The mortgage provided that in case of default the mortgagee should take possession of the mortgaged property and sell it at public auction after giving two weeks' notice of the sale. The mortgagor remained in possession of the property under the mortgage, and while in such possession sold it and thereupon delivered possession to his assignee.

R. S. Strahan and L. Flynn, for appellants.

Powell & Bilyeu, Humphrey & Wolverton, and Dolph, Bronaugh, Dolph & Simon, for respondents.

By the Court, BOISE, J.:

It is claimed by the respondents that as there is a manner for foreclosing this mortgage provided in the instrument itself, the provisions of section 2, page 688, of the statute

Opinion of the Court—Boise, J.

apply to it, and that it must be foreclosed by the mortgagees under and in pursuance of the stipulation of the parties contained in the mortgage. Section 2 provides that " whenever in any mortgage of goods and chattels the parties to such mortgage shall have provided the manner in which such mortgage may be foreclosed, such mortgage, upon breach of the conditions thereof, may be foreclosed in the manner therein provided, and not otherwise." Section 1 provides that on the breach of the condition of such mortgage, the mortgagee shall be entitled to the immediate possession of the property mortgaged. The stipulation in the mortgage is a mutual agreement between the mortgagor and mortgagee which both parties are bound to observe, and neither party can avail himself of it unless he has kept the agreement on his part.

On breach of the conditions of the mortgage by the mortgagor, by failing to pay the note, it was his duty to deliver to the mortgagee the property, that he might sell the same according to the stipulation. On his refusal to give up the property, the mortgagee might have brought replevin against him, which action the mortgagor could have defended by showing that the property had been in some manner released from the mortgage. This remedy by replevin was a remedy which existed in such cases before this statute was enacted. In the prosecution of such action to recover the possession of the property, the mortgagee would or might be subjected to delays, and might be obliged to take an alternate judgment for the property or its value, and would not be able to reach the property with that certainty as in a suit in equity, where the property could be put into the hands of a receiver. His remedy would not be as complete and adequate in an action as in equity. In this case, where an assignment had been made, there might be difficulty in proceeding under the stipulation in the mortgage, in determining to whom the surplus, if any remained after satisfying the mortgage, should be paid.

We think the proper construction of section 2 is, that when the parties have agreed to a certain manner of foreclosing, either has a right to insist on a foreclosure in that

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manner, but before the mortgagor can insist on the sale of the property by the mortgagee, in the manner stipulated, he must fulfill his part of the agreement by suffering the mortgagee to take possession of the goods, and that the mortgagor can not refuse to fulfill the agreement on his part, by refusing to give up the goods, and at the same time insist on a performance by the mortgagee. To give any other construction to the contract would be to hold that the mortgagor can take advantage of his own breach of contract to defeat the just claim of the mortgagee, which is contrary to the maxim that no man can avail himself of his own wrong. Such a construction will also harmonize the provisions of section 2 with section 410, which provides that "a lien on real or personal property, whether created by mortgage or otherwise, shall be foreclosed by suit." Such a construction will do no violence to the plain meaning of the statute, and will facilitate the administration of justice and be in harmony with the general principles of the construction of statutes.

It is also claimed by the respondents that this mortgage is void as to subsequent creditors, for the reason that the mortgagor retained the property in his possession with a general power to sell the same. If this be true, then the mortgage would be void. (*Iri Orton v. M. W. Orton*, 7 Or. 478.) In *Orton v. Orton*, it appeared from the testimony on the trial, as a fact, that Iri Orton had made M. W. Orton, his mortgagor, his agent to sell the mortgaged goods, consisting of a stock of merchandise in his, the agent's, business as a retail merchant, and put him in the store for that purpose. In this case the agreement in the mortgage is, that "until default is made in the payment of said sum of money, the parties of the first part (the mortgagors), their executors, administrators, and assigns, may retain and continue in the quiet and peaceable possession of said goods and chattels, and in the full and free use and enjoyment of the same, except as herein-before provided;" and that proviso was that said goods should not be removed from within said county and state, so that whatever assignment was made, said goods were to remain in the county.

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We think the right to assign is by this instrument confined to an assignment subject to the lien of the mortgage, and that such a power of assignment would not render the mortgage void. Until condition broken, the mortgagor is the owner of the property, and "he may sell, incumber, devise, or convey the mortgaged property." (Harmon on Chattel Mortgages, 459.) So that the power to assign contained in the mortgage gave the mortgagor no more power over the goods than he would have had if that word had not been inserted in the mortgage.

The demurrer in the suit will be overruled, and the decree of the court below sustaining said demurrer be reversed, and the suit remanded to the circuit court for further proceedings.

E. A. JONES, RESPONDENT, v. ANDREW SNIDER, APPELLANT.

8	127
17	445
21*	439
8	127
36	522
8	127
40	80

VERDICT.—In an action to recover specific personal property, where the jury find a general verdict for damages, without finding on the issues of ownership and of the value of the property, such general verdict is not warranted by the statute, and no judgment can be rendered thereon.

WHAT PRESUMPTIONS NOT RAISED UPON VERDICT.—Where the statute directs a special finding upon certain issues, a general verdict for the plaintiff will not raise a presumption that the jury have passed upon the issues not named in the verdict.

APPEAL from Multnomah County.

This action, as appears by the complaint, was brought to recover personal property with damages for the withholding thereof. The cause was tried in the circuit court by a jury, who found generally for the plaintiff, and assessed his damages at the sum of three hundred dollars.

Hill, Durham & Thompson, for appellant.

W. Scott Beebe, for respondent.

By the Court, Boise, J.:

This being an action to recover specific personal property, the statute regulating such a proceeding in section 211 has

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provided what the verdict shall find is as follows: "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property if the verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, may at the same time assess the damage, if any is claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."

The issues presented by the pleadings were: 1. As to the ownership of the property described in the complaint; 2. As to its value; 3. As to the amount of damages which the plaintiff had sustained by reason of the wrongful taking or withholding of the property. The jury found the following verdict: "We, the jury in the case of E. A. Jones *v.* A. Snider, find for the plaintiff, and assess the damages at the sum of three hundred dollars, and interest one hundred and eleven dollars and sixty-seven cents—total, four hundred and eleven dollars and sixty-seven cents."

This verdict does not find on the issues as to the ownership of the property, or assess its value, but finds on the issue as to the damages. The statute directs that the verdict shall be special and find on all these issues, and where the statute directs that the jury shall find a special verdict, and on certain named issues, the rendering by the jury of a general verdict for damages, will not raise the presumption that the jury have found on the issues not specially named in the verdict. To warrant the jury in making inquiry as to the damages, they must first find that the plaintiff was the owner of the property or entitled to the possession. A verdict, to be valid, must find on all the issues in the case, so that the controversy shall be finally determined. In cases where a general verdict is proper, the presumption is from such finding that the jury has passed on all the issues necessary to sustain the finding. But where the court or the statute direct a special verdict, the court will not render a judgment on a general verdict; for it is not de-

Argument for Appellant.

cided by it how the special issues have been determined. In this case it does not appear which party was the owner of the property in controversy, or what was its value, and leaves the case at issue and undetermined.

It is claimed that the notice of appeal does not specify the errors complained of, which have been argued and which we have noticed above. We think there is nothing in this objection; for the notice of appeal does specify as error that the court rendered a judgment on the verdict, and claim that no judgment could be rendered thereon, and this is, we think, a sufficient specification of error.

The judgment will be reversed and a new trial ordered.

H. O. TENNY ET AL., RESPONDENTS, v. N. E. MULVANEY ET AL., APPELLANTS.

SEVERABLE CONTRACT.—T. contracted to cut and deliver at the mill of M. one million feet of merchantable logs within the year, at four dollars and twenty-five cents per thousand feet, to be scaled and received as each one hundred thousand feet were placed in a certain creek. *Held*, that the contract was severable and not entire.

APPEAL from Douglas County. The facts are stated in the opinion.

W. R. Willis, for appellant:

The contract in this case is entire, to furnish one million feet of logs in one year, and keep logs on hand, etc., at the rate of four dollars and twenty-five cents per thousand feet, and payment was to be made on its fulfillment, and not on the delivery of each one thousand feet, as stated in the charge to the jury by the circuit court. (*Shinn v. Bodine*, 60 Penn. 182-185; *Coburn v. City of Hartford*, 38 Conn. 290; *Isaacs v. McAndrew*, 1 Mon. T. 437, 450, 451; *Cow. Tr. secs.* 271, 272; *Averill v. The Hartford*, 2 Cal. 310; *McMillen v. Vandyke*, 12 Johns. 165; *Clark v. Baker*, 5 Met. 452.)

This contract fixes the quality of logs to be furnished, and it was error and calculated to mislead the jury to admit evidence of the character of the timber in the vicinity of the

8	129
8	513
9	407
8	129
42	281

8	129
48	154
8	129
46	45

Argument for Respondents.

defendants' mill, and what quality of logs witness (Comstock) would expect to receive, etc., also that the logs delivered were average logs on Pass creek. By the terms of this agreement the plaintiffs were required to deliver good, sound, merchantable logs, at defendants boom, unincumbered with rotten and unmerchantable logs, and defendants were not required to be at great or any expense or trouble in selecting or separating them, nor to have the boom obstructed by such bad logs, and the court erred in refusing the instruction asked to be given by defendants and in giving the instructions he did on that subject.

Good, sound, merchantable logs in one place are good, sound, merchantable logs in any other place, and it does not depend upon the character of the timber in the vicinity. The evidence shows that there was plenty of good, sound, merchantable logs in the timber furnished by defendants, if plaintiffs had picked them out; also, that out of three hundred and four thousand eight hundred and twenty-four feet of logs put in the water, there was but one hundred and thirty-seven thousand and fifty-four feet of good, sound logs; also, that defendants offered to receive and pay for all that was good, but refused to select them out from the bad in the water.

It was no breach of the conditions of this agreement on the part of defendants to receive the logs, until they were separated from the bad; and no default in payment, for there was nothing due until the end of the year, and one million feet of logs had been delivered.

John Kelsay, and Herman & Ball, for respondents:

It is provided in the contract that the defendants shall pay the plaintiffs four dollars and twenty-five cents per thousand feet for good, sound, merchantable logs delivered at the boom. When the kind of logs mentioned in the contract were delivered in the boom the defendants were undoubtedly liable. The plaintiffs did not agree that there should be no rotten logs with the good ones. (30 Cal. 449, 450; Chitty on Contracts, 113; 3 Graham & Wat. on New Trials, 710.) The instruction refused by the court was

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substantially given in the charge of the court. (47 Cal. 95, 96.)

The court did not err in its charge to the jury, in which it is stated that "the defendants were not to receive or scale or pay for any logs which were not good, sound, or merchantable, but the fact that plaintiffs may have put into floating water some logs that were not good or sound or merchantable, if such shall be found by you from the evidence to be the fact, did not excuse the defendants from their agreement to receive and pay for those that were good, sound, and merchantable. (1 Chitty on Contracts, 113.) There is no exception in the contract or reservation that would interfere with or render erroneous this charge. (Id. 137, note d.)

The court did not err in its charge in relation to the general quality of the timber, etc. The construction of the contract was for the court, being a question of law. (2 Parsons on Contracts, 492; Civ. Code, 248, sec. 686; 1 Chitty on Contracts, 117, note y, 103.)

The court charged the jury as to the construction of the contract that "the purchase price of all logs delivered under the contract at the boom, due," etc. (35 Cal. 241; 2 Chitty on Contracts, 1084; 2 Parsons on Contracts, 551, 552; Id. 499-521; 3 Wend. 363; 1 Chitty on Pleadings, 322; 1 Chitty on Contracts, 117, note p, 113-126.)

In ordinary cases, if the court see that notwithstanding a misdirection, a new trial ought to produce the same result, a new trial will not be granted. (1 Graham & Wat. on New Trials, 208, 270, 301; 3 Id. 717; 13 Cal. 429; 22 Id. 50; 18 Id. 377.)

By the Court, PRIM, J.:

This is an action to recover damages on a breach of contract based upon the following facts as alleged in the complaint: That about the twenty-ninth of May, 1878, the respondents and appellants entered into an agreement by which the respondents promised to furnish the appellants at their boom in Pass creek, in Douglas county, good, sound, merchantable logs for four dollars and twenty-five

Opinion of the Court—Prim, J.

cents per thousand feet. The appellants agreed to scale and pay for each one hundred thousand feet of said logs when placed in floating water in the creek above the boom; that the respondents delivered before the commencement of this action, in the boom, one hundred and sixty-five thousand one hundred and sixty-nine feet of good, sound, merchantable logs, and that they delivered in said floating water above the boom, one hundred and thirty-nine thousand six hundred and fifty-four feet of good, merchantable logs; that appellants became liable for the logs in the sum of one thousand two hundred eighty-five dollars and fifty-nine cents, on which has been paid one hundred and thirty-five dollars, and no more; that there is due one thousand one hundred and fifty dollars; and for a separate cause of action, it is alleged that by the terms of the agreement, the appellants were to furnish the standing timber within one mile of the creek above the boom, and to scale and pay respondents for each one hundred thousand feet of said logs, when placed in the floating water of the creek. Respondents were to deliver to appellants at the boom, one million feet of good, sound, merchantable logs, with the privilege of furnishing as much more as they could put in the creek in one year.

It is alleged that respondents proceeded under the contract, and had cut a large amount of logs, and were proceeding to complete the contract, when the appellants, about the fourteenth of August, 1878, broke the contract and refused to receive or pay for the logs; that the respondents could and would have delivered within the year one million five hundred thousand feet of good, sound, merchantable logs but for the breach; that respondents have been damaged on account of said breach three thousand dollars, in addition to the amount claimed in the foregoing cause of action.

The appellants, for answer to the complaint, deny that the respondents agreed to furnish good, sound, merchantable logs for four dollars and twenty-five cents per thousand feet; but allege they were to furnish at the mill in one year, from the twenty-ninth of May, 1878, one million feet

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of good, sound, merchantable logs, and keep logs on hand so the mill should not be shut down for want of logs, at four dollars and twenty-five cents per thousand feet, with the privilege of putting more than one million feet in the boom, at the same price, if they could do so within the year; deny that they agreed to pay for each one hundred thousand feet, or any part thereof, until the contract was completed; deny that the respondents delivered one hundred and sixty-five thousand one hundred and sixty-nine feet of merchantable logs, or more than thirty-five thousand feet, or that they delivered in the floating water one hundred and thirty-nine thousand six hundred and fifty-four feet, or any more than ninety-five thousand feet; deny that they became indebted for said logs in the sum of one thousand two hundred and eighty-five dollars and forty-nine cents, or any sum; deny that there is due one thousand one hundred and fifty-four dollars, or any part thereof, or that they were to pay for each one hundred thousand feet placed in the floating water, or any part thereof, until the end of the year.

The agreement in question is as follows: "This article of agreement, made and entered into this the twenty-ninth day of May, 1878, between N. E. Mulvaney and E. C. Bemis of the firm name of Mulvaney & Bemis, parties of the first part, and H. O. Tenny and Neil McKenzie of the firm name of Tenny & McKenzie, parties of the second part. Parties of the first part agree to pay parties of the second part four dollars and twenty-five cents (\$4.25) per thousand (1,000) feet for good, sound, merchantable logs, delivered at the boom in Pass creek; also, agree to furnish timber for logs, not to exceed a mile from the bank of the creek; to scale each one hundred thousand (100,000) feet that is in floating water.

" The parties of the second part agree to furnish logs to the parties of the first part one million (1,000,000) feet, with privilege of furnishing as much more as can be put in the creek in the year, from this date, at the boom in Pass creek; the parties of the second part shall keep logs on hand for the parties of the first part, so that the mill shall not be shut down during the year, and are to cut four hundred

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thousand (400,000) feet, more or less, from Richey canyon."

It is alleged that the respondents failed and refused to comply with said agreement; that they put into the boom and floating water a large amount of unsound and unmerchantable logs, and prevented appellants from getting logs to keep their mill running; that their mill was for a long time shut down by reason of respondents' failure to perform the conditions of said agreement on their part, to appellants' damage in the sum of four thousand dollars.

The first ground of error complained of by appellants was the admission of certain testimony on behalf of the respondents to show the general character of the timber on Pass creek and in the vicinity of the appellants' mill, and to show that the logs furnished by respondents were average logs from said timber.

The bill of exceptions shows that respondents called J. J. Comstock and asked him this question: "What is the character of the timber near defendants' mill?" The question was objected to, and the witness answered: "The timber on Pass creek, where defendants' mill is situated, is a great deal of it bad and punky, some of it rotten, some knotty, and some not; if I sent a man to cut logs I would expect to take what was on the ground; I have owned and run a saw-mill on Pass creek for several years."

Wm. Rosee was called and asked to state if the logs furnished by the plaintiffs were an average of the logs on Pass creek. Defendants' counsel objected. The witness testified that the logs furnished were average logs on the creek.

It will be seen by the terms of the contract that appellants were to furnish the standing timber from which these logs were to be cut, none of which was to be located further than one mile from the bank of the creek. As the logs were to be selected and cut from the timber in a particular locality, we are of the opinion that the admission of the evidence was proper. Witness Comstock was probably allowed to go a little too far in stating what he would expect to do if he put a man out to cut logs; but it appears that

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the jury were instructed by the court that he "admitted this evidence merely to assist them in determining whether the logs in dispute were merchantable at the place where they were delivered—that saw-logs which are merchantable in one locality may not be merchantable at another."

The second and third assignments of error will be considered together.

The second is that the court erroneously refused to charge the jury as requested by appellants. The third is that the court erroneously charged upon the point requested. The court was asked by the appellant to charge: "That in this case the plaintiffs can not perform their agreement by delivering in the boom at the defendants' mill good, sound, merchantable logs, mixed promiscuously with a large portion of rotten, unmerchantable logs, and require the defendants to select the good, sound, merchantable logs."

This instruction was refused, but instead thereof, the court charged the jury: "That the defendants were not bound to receive or scale or pay for any logs which were not good, sound, or merchantable, but the fact that plaintiffs may have put into floating water some logs that were not good, or sound, or merchantable, if such shall be found by you from the evidence to be the fact, did not excuse the defendants from their agreement to receive and pay for those which were good, sound, and merchantable. But if it would be impossible to separate them, or it could not be done without great expense, it would excuse them."

The evidence bearing upon this point, as disclosed by the bill of exceptions, tends to show, that after the logs were in the water, one of the appellants told one of the respondents they would take and pay for all the good logs, but could not divide and separate them from the rotten ones in the creek, and that was the reason why they had refused to receive them; that there was plenty of good, merchantable logs in the timber furnished by appellants, if respondents had seen proper to select and cut them, but a large proportion of the logs put in floating water above the boom were rotten and unmerchantable, and they were mixed up with good ones. Thus it will be seen that the evidence tends to show

Opinion of the Court—Prim, J.

that the respondents undertook to deliver a lot of good, sound, and merchantable logs, mixed promiscuously with a large proportion of rotten and unmerchantable ones. This they could not do, as by the terms of the contract they were required to deliver a certain quality of logs unincumbered with a large number of other logs not receivable under the contract. Appellants having taken the precaution to contract for good, sound, and merchantable logs, should not have been subjected to any considerable expense and trouble in separating the good logs from the bad ones.

But it is insisted by respondents that no injury resulted to appellants from the refusal of this instruction, for the reason that it was afterwards substantially given in the instruction that followed. That instruction is to the effect that while appellants are not bound to scale, receive, or pay for any logs not good, sound, or merchantable, the fact that some of that quality may have been put in floating water by respondents, did not excuse the appellants from their agreement to receive and pay for such as were good, sound, and merchantable. So much of the instruction is not objectionable, but the clause which follows is. It is in these words: "But if it would be impossible to separate them, or if it could not be done without great expense, it would excuse them." In our opinion, this instruction fails to embrace the substance of the one asked for and refused.

The court further instructed the jury as follows: "The parties to this action have reduced their contract to writing—all the terms of the contract must be sought in the written agreement. The construction of the contract is a matter of law for the court. An issue is made in the pleading as to when the contract price for any logs became due and payable. This issue must be decided by the court. It depends altogether upon the construction of the written contract. I now instruct you that by the terms of the contract, the purchase price of all logs delivered under the contract became due immediately upon their delivery at the boom of defendants. Defendants agreed to receive and pay for all good, sound, merchantable logs delivered to them at the boom by plaintiffs, four dollars and twenty-five

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cents per thousand feet. This price they agreed to pay when the logs were delivered at the boom." To this instruction appellants excepted, and assign it as error.

It is insisted by the appellants that this contract is entire and not severable; that it should be construed to mean that respondents were to furnish one million feet of logs within the year, at the rate of four dollars and twenty-five cents per thousand feet, and to keep a sufficient number on hand to keep the mill running—payment to be made on its fulfillment and not on the delivery of each one hundred thousand feet.

As to whether this contract is entire or severable is a question of construction, which depends upon the intention of the parties, to be ascertained from the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed. (2 Parsons on Contracts, 517.)

Adopting this rule of construction, we have reached the conclusion that the contract is severable and not entire. While the whole number of logs to be delivered was one million of feet at a certain price per thousand, yet they were to be delivered in quantities of one hundred thousand feet at a time, and the contract being silent as to the time of payment, it will be implied that they were to be paid for when delivered.

Error having been committed in the refusal of the court to instruct, as asked by the appellants, the judgment is reversed and the cause remanded to the court below for a new trial.

Opinion of the Court—Boise, J.

**JAMES A. CAUTHORN, RESPONDENT, *v.* SOL KING
AND M. H. BELL, APPELLANTS.**

JOINT WRONG-DOERS—GENERAL VERDICT.—Where, in an action for a wrongful conversion of property against two defendants, both answer, and a general verdict is rendered, it is a verdict against both defendants, and judgment should be given against both. But if, in such case, judgment is rendered against one only, it is error. If the defendant against whom the judgment is rendered appeals from the justice's court where the judgment was rendered, to the circuit court, and on the trial had in the circuit court both defendants appear and defend, the circuit court has jurisdiction to render judgment against both defendants on a verdict of guilty against both.

PLEADINGS, AFFIDAVITS NOT ADMITTED TO EXPLAIN.—In order to determine the issues to be tried in an action, the court can only look to the pleadings, which cannot be enlarged or explained by affidavits.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth, for appellants.

R. S. Strahan and J. W. Rayburn, for respondent.

By the Court, BOISE, J.:

The complaint alleges that appellants, in April, 1878, had in their possession fifty-five and thirty-five sixtieths bushels of wheat belonging to respondent, of the value of one dollar per bushel, and that appellants wrongfully and unlawfully converted it to their own use.

The answer denies all the allegations of the complaint, and alleges further that the transaction complained of arose between appellants and one Jerry E. Henkle, who had stored wheat with appellants, and by accident and mistake had got the warehouse receipt of appellants for fifty-five and thirty-five sixtieths bushels too much, and that said Henkle transferred said receipt to respondent, and that respondent brought suit thereon before W. H. Johnson, justice of the peace. The reply denied the mistake. The real issue was as to whether there was a mistake, or whether appellants had the wheat of respondent. The issue was tried before a jury, who rendered the following verdict: "We,

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the jury, find for the plaintiff the sum of forty-four dollars and twenty-four cents."

Judgment was rendered against the defendant Bell, alone. From this judgment Bell appealed to the circuit court. It is claimed by the appellants that King did not answer, and that Bell alone appeared in the case in the justice's court. But on examining the answer, it appears to be the answer of both defendants, and is signed by F. A. Chenoweth and E. Holgate, attorneys for defendants. With this answer on file, no judgment could be taken against the defendant, King, without a trial, and it is a mistake of fact by appellants to now assert that there was no issue to try between the plaintiff and King. As the case stands on the pleadings, it was necessary for the plaintiff to make out his case, and it being a case of tort, he could have a verdict against both defendants, or either of them, as the proof should warrant. The parties had answered together, and the trial necessarily proceeded against both, and as the jury found a general verdict, it was a verdict against both. If the evidence did not implicate both in the wrong complained of, then the verdict should have been against the guilty party alone, and the other party should have been found not guilty of the wrong charged in the complaint.

The record shows that on the trial "E. Holgate and F. A. Chenoweth appeared for Bell and filed answer," but that answer is, in form, by both defendants. The attorneys, Chenoweth and Holgate, signed the answer as attorneys of defendants, and on the back of said answer is indorsed, "Chenoweth & Holgate, defendants' attorneys." To determine what the issue was that was before the court for trial, we must be controlled by the pleadings, and in this case they show that both defendants appeared and answered, and it is clear that the verdict in the justice's court was against both defendants, and that the plaintiff was entitled to a judgment against both. The judgment, however, was rendered against Bell alone, and was, therefore, erroneous, whether entered on the motion of plaintiff or not. And from this judgment either party could appeal to the circuit court. The defendant Bell appealed, and the cause came

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on for trial in the circuit court on the issues as presented by the pleadings in the justice's court. (Civ. Code, 221, sec. 533.) King was as much a defendant in these pleadings as Bell.

It is claimed by the appellants that Bell being the only party to the judgment appealed from, King was not brought into the circuit court by the appeal; that he was no party to it, and that he was not compelled to appear in the circuit court, and did not appear, and is not bound by its judgment against him. On looking into the record we find that when the cause was tried in the circuit court, the "defendants and appellants, by their attorneys, Messrs. Chenoweth & Holgate," appeared and proceeded with the trial, which resulted in a general verdict for the plaintiff. This record must be taken as true, and shows that the defendant King did appear in the circuit court; and we think he waived any want of notice of the appeal and submitted himself to the jurisdiction of the court for the trial of the issues presented in the pleadings; and this does away with the appellant's objection that King was not properly in court to assert his rights. It is not, therefore, necessary to decide in what position he would have been had he not appeared and defended the action in the circuit court. It is true that Bell appeared alone to make the motion for a judgment, notwithstanding the verdict, and excepts to the ruling of the court on that motion; and it also appears in the bill of exceptions that both Bell and King appeared and excepted to the entry of the judgment on the verdict in the circuit court, which is the subject of this appeal. In the bill of exceptions is this language: "Defendant M. H. Bell excepts to the decision of said court in overruling said motion for judgment in favor of said defendant, notwithstanding the verdict; and defendants, King and Bell, except to the decision or order directing judgment to be rendered in said action against Sol King and M. H. Bell."

It therefore appears, not only by the record of the trial, but by the appellant's bill of exceptions, that King appeared in court after the verdict was rendered and objected to the entry of judgment thereon. We think that this record

Argument for Appellant.

shows that both defendants appeared and answered and went to trial in both courts, and are bound by their proceedings, unless the verity of the record can be impeached by the affidavits which are set out in the bill of exceptions. These affidavits are offered to explain the record and show that its recitals, showing the appearance of King, are not true. This, we think, can not be done; that the record is a verity and can not be contradicted by affidavits. A record can only be tried by the record itself, and we can not and have not considered the affidavits in determining the case.

The judgment of the circuit court will be affirmed, with costs.

W. O. KENDALL, APPELLANT, v. WALLACE POST, RESPONDENT.

ROAD SUPERVISOR—SOLE JUDGE OF NECESSITY FOR TAKING MATERIALS.—

In repairing a public road, the supervisor of roads has authority to enter upon any lands adjoining or near the public road, whether the same be inclosed or not, in order to obtain stone with which to repair the road; and the supervisor alone is to be the judge whether it is necessary to use stone or not in order to make the repairs.

IDEM—COURT OF EQUITY WILL NOT INTERFERE.—So long as the supervisor does no act to willfully oppress or annoy the owner of the premises where the stone or other materials are procured to repair the public roads, a court of equity will not interfere to restrain him in the discharge of his official duties as supervisor.

IDEM—DAMAGES—COUNTY COURT MUST ASSESS.—If the owner of lands from which stone or other materials are taken to repair the public roads feels aggrieved by the acts of the supervisor, he must apply for redress to the county court, while transacting county business, to assess and determine the damages sustained by him.

DAMAGES ASSESSED WITHOUT JURY.—Section 29 of chapter 50 of the miscellaneous laws, which provides for the assessment of damages for taking stone or other materials to repair the public roads, is not unconstitutional because it authorizes the county court to assess the damages without a trial by jury.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth, for appellant:

Private property cannot be taken for public uses without

8	141
25	408
25	488
25	489
36 ⁸	539
36 ⁸	530
36 ⁸	532

Argument for Respondent.

compensation. (1 Abb. Dig. 639, sec. 2.) Where the statute fails to provide for the assessment of damages, the act is void. (24 Cal. 432; 19 Barb. 118.) Where private property is taken without the consent of the owner, the statute must be strictly pursued. (Id. 431.) There is no authority of law for entering a man's inclosure. (Cooley on Constitutional Law, 530; 27 Barb. 207.) At the passage of the road law, 1860, most of the land in Oregon was uninclosed.

There is no right of trial by jury before the county court, nor right of appeal. (Misc. Laws, 729; 15 Barb. 255; 1 Abb. Dig. 640, sec. 6; 12 Am. R. 147, 585, 692; 2 Id. 59-64; 12 Id. 147.) The county is not competent to try its own case. Where there is no necessity to take private property, there is no right. (43 Conn. 234; 21 Am. R. 643.) A court of equity has jurisdiction to enjoin a man from disfiguring a cemetery. (21 Am. R. 647, note.) A ministerial officer is liable for acts done without authority of law, or going beyond authority of law. (Cooley's Const. Lim. 560, and note; 19 Am. R. 718; *Monroe v. Pardee*, 64 Barb. 353.) A court of equity has jurisdiction, because a court of law is not adequate to restrain.

John Burnett and W. S. McFadden, for respondent:

The respondent, as road supervisor, had a legal right to enter on the premises in question and take gravel or dirt therefrom to build or repair the county road. (Misc. Laws, 728, sec. 28.) The statute provides the manner of compensating persons damaged by the acts of the supervisor in taking materials from adjoining land to repair a road. (Id. 729, sec. 29.) Until the claim was presented to the county court, as provided by statute, the appellant would have no cause of action or suit. (18 Cal. 144; 28 Id. 662.) The mode of compensation being fixed by statute, the appellant must follow that course. (Cooley's Const. Lim. 700.) It is competent for the legislature to make the supervisor the sole judge of the necessity for the taking of materials to repair the highway. (Id. 672, 673, and notes.) Public agents who

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keep within the statute are not liable to a common law action of trespass. (Id. 705; 1 Parsons on Contracts, 96.)

No action lies against a road supervisor who acts for the public, unless given by statute. (8 U. S. Dig. 386, sec. 8; 5 Neb. 385; 66 N. Y. 62.) A road supervisor is the agent of the county, and is liable to a fine for a failure to perform his duties in repairing the county roads in his district, and the county is liable to persons injured by the road being out of repair. (Misc. Laws, 730, sec. 35; 3 Or. 424.) When the right of a party is doubtful, the court will not grant an injunction. (Willard's Eq. 382; 3 Paige Ch. 213; 2 Barb. Ch. 101; 3 Johns. Ch. 282; High on Injunction, 7, sec. 8.)

By the Court, KELLY, C. J.:

The appellant in his complaint sets forth that he is the owner of a certain tract of land in Benton county, and that the respondent was and is the supervisor of roads, and as such supervisor was engaged with a number of men in working on the county road in the vicinity of the said premises; that while so engaged he entered upon the lands of appellant, pulled down the fences, quarried rock and stones and hauled them away to repair the highway; that the quarry from which the rock and stone were taken was within an inclosure in which the appellant had a garden, orchard, meadow, and growing grain which were turned out to the commons by opening the fences; that the teams and men engaged in hauling away the rock and stone have trodden down his grass, and that the quarrying and carrying away the stone and rock has greatly disfigured his premises and will materially lessen their value; that the place where the stone was dug is near a family burial place and upon grounds which have been prepared and kept neat for many years, and that money would not compensate the appellant for disfiguring the premises as respondent proposes to do. The complaint further states that the said grounds are one fourth of a mile from the county road upon which the stone and rock are placed, and that the same kind of rock can be had without entering any inclosure, by going one half a

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mile farther; that there is good material more convenient to said road and suitable to repair the same outside of his inclosure, and that respondent was not compelled for want of suitable materials to enter his inclosure to obtain the materials to replace the road. He further alleges that respondent threatens to haul five hundred wagon loads of stone more from said premises and will do so unless restrained. The appellant then alleges that he has sustained damage in the sum of five hundred dollars in the destruction of his grass, exposure of his garden and orchard, etc., and prays for a decree awarding him that sum and for an injunction to restrain the respondent from trespassing on his premises and removing stone and rock from the same. The respondent demurred to the complaint and the court sustained the demurrer and dismissed the complaint.

The law imposes a duty upon the supervisor of roads to open and keep in good repair all public roads in his road district and in order to do so he is authorized, among other things, "to enter upon any lands adjoining or near the public road and gather, dig, and carry away any stone, gravel, or sand * * * necessary for making and repairing any public road." Upon the supervisor devolves the duty of determining how a public road is to be repaired and what materials are to be used for that purpose. If, in his judgment, stone or gravel are better materials than clay, he can go upon any lands adjoining or near the public road, whether inclosed or not, and dig and carry away the stone or gravel required for the purpose of making the repairs. And it is not necessary for him to wait until he can procure the consent of the owner or the judgment of a court assessing the damages to be paid for appropriating the materials necessary for the public use. Every owner of the land holds it subject to be taken for the public use whenever it is necessarily required for that purpose and to be appropriated in such a manner as the constitution and law provide.

It is alleged in the complaint that stone of the same kind could be procured by the supervisor without entering an inclosure, by going a half mile farther for it. We think it is the duty of that officer as well as all others to procure

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whatever materials he may require for the use of the public with as little expense to the tax-payers as possible, and in our opinion he would not have been justified in going to the needless expense of hauling the stone half a mile farther than he did. Another allegation in the complaint is that a family burial ground is near where the rock was quarried, but how near is not stated. There is no charge, however, that the respondent has injured it or that he threatened to injure it, or in any way disturb the repose of the dead. The appellant, moreover, alleges that he has for years kept the grounds inclosed and in a neat condition and that the acts of the respondent have despoiled them of their beauty. It may be unfortunate for the appellant that this is so, and that the highway passes so near his premises. But in this utilitarian and progressive age, the beautiful must often give way to that which is useful, when it is for the public good.

The highways must be kept in repair to accommodate the travel upon them, and it so happens in this case that the appellant's land is the nearest and most convenient where suitable materials for that purpose can be had. It is true the appellant alleges in his complaint that good materials and suitable for repairing the road can be had outside of the inclosure. But he is not to be the judge of what is suitable. That is for the supervisor, and for him alone. It does not appear from the allegations in the complaint that the respondent in the exercise of his official duties was doing any act to oppress or wantonly annoy the appellant by entering his inclosure and taking away materials to repair the public road, and where that is the case the court ought not to interfere and restrain him from discharging those duties which the law has imposed upon him.

Section 29, chapter 50, of miscellaneous laws, provides, that "if any person shall feel aggrieved by the act of any supervisor cutting or carrying away timber or stone as aforesaid, he may make complaint thereof in writing, to the county court, at any regular meeting within six months after the cause of such complaint shall exist, and such court shall proceed to assess and determine the damages, if any, sustained by the complainant, and cause the same to be paid

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out of the county treasury. The appellant contends that this section of the road law is unconstitutional and void, because it provides for the assessment of damages without a trial by jury, and to sustain this view, we are referred to article 1, section 17, of the constitution, which declares that "in all civil cases the right of trial by jury shall remain inviolate."

This constitutional provision does not apply to cases of taking private property for public use, but to actions in courts of justice. It was intended as a safeguard in the trial of those cases for which it is stipulated that the courts shall remain open, and wherein the parties to the suit shall have a trial by due course of law. In 2 Dillon on Mun. Corp. (sec. 483), the law on this subject is thus stated by the distinguished author: "The determination of the question, 'What is the *value of property* taken, or what is the *amount of damages* sustained by the taking?' is undeniably judicial in its nature and peculiarly adapted for decision of a jury under the direction of the court. Yet it has been held that the ordinary provision as to the right of trial by jury, in civil cases, has no relation to original assessments in such cases, and that in the absence of special provision in the organic law, giving the right to have a jury assess the damages, it is competent for the legislature to provide for assessments by any other just mode, and to conclude the owner, as to the amount, without giving him the right to be heard before a jury." The authorities referred to by Judge Dillon, in support of his position, show that this question has been long since settled beyond any doubt or controversy. (*Livingston v. Mayer*, 8 Wend. 85; *Beekman v. Railroad, etc.*, 3 Paige, 75; *Railroad Co. v. Heath*, 9 Ind. 558; *Heynemon v. Blake*, 19 Cal. 519; *Brazos R. R. Co. v. Ferris*, 26 Tex. 588.)

If the appellant felt aggrieved by the acts of the supervisor, he should have applied to the county court, composed of the county judge and the county commissioners, while transacting the county business. That is the only tribunal which has authority to assess and determine the damages to which he was entitled for the acts of the respondent.

The decree of the court below is affirmed.

Statement of Facts.

SARAH BIGLOW ET AL., APPELLANTS, *v.* J. R. LEABO AND CHARLOTTE LEABO, RESPONDENTS.**UNDUE INFLUENCE MUST BE CLEARLY SHOWN TO SET CONVEYANCE ASIDE.**

—In order to warrant a court of equity in setting aside a deed alleged to have been executed under undue influence, exercised by the grantee over the grantor, the evidence must clearly establish that such influence was exerted, and that the deed was executed by reason of such influence, and would not have been executed had not the influence been exerted, and that the deed was not the free act of the grantor.

APPEAL from Yamhill County.

This is a suit by the appellants to set aside a conveyance executed by one John G. Parrish, on March 14, 1876, to the respondents. The complaint, in substance, alleges "that John G. Parrish died in Yamhill county, state of Oregon, on the tenth day of November, A. D. 1876, and left surviving him, as heirs at law, the above-named appellants—Sarah Biglow, Margrette E. Chrisman, Wm. H. Parrish, and Ella Wisecarver; that on the fourteenth day of March, 1876, and long prior thereto, the said John G. Parrish was the owner of a certain tract of land containing one hundred and sixty-nine and twenty-five hundredths acres, situated in Yamhill county, state of Oregon; that he was, on the fourteenth day of March, 1876, and long prior thereto, old and infirm, and wholly incapacitated from attending to any business, by reason of his being of weak mind; that the defendants on said day, fraudulently taking advantage of his inability and imbecility of mind, did overpersuade him to make, sign, and deliver to them the deed to said land, without any consideration therefor, and in fraud of the rights of plaintiffs, who are children of the deceased John G. Parrish."

The respondents deny the allegations of incompetency in Parrish, and of undue influence. For a separate defense, they allege, in substance, that on the twenty-sixth day of January, 1876, Parrish came to reside with the respondents, and to make his home with them, and continued to so reside with them till the date of the execution of said deed

Argument for Appellants.

by him, and thereafter until his death; that during this time he was old and infirm in health, and not able to take care of himself, or do any work, and that they, at his request, boarded him and furnished him a home, and took care of him, and paid out for him money for medicines and medical treatment and necessaries of life; that on the said fourteenth day of March, 1876, Parrish and the respondents entered into a contract whereby they agreed to keep, board, lodge, maintain, and care for Parrish the remainder of his life; and Parrish agreed, in consideration of said board, lodging, etc., to convey to the respondents the land described in the complaint, and they were to execute to Parrish a life lease upon said land for the purpose of further securing to him the performance of said agreement and the conditions of the deed, and that said deed was executed and delivered in pursuance of said agreement, and that the agreement was fully complied with on their part; that since the execution of the deed they have made valuable and permanent improvements on said land to the value of eight hundred dollars, and that the appellant, Wm. Parrish, son of said John G., abused and ill-treated his father, said John G. Parrish, and that by reason thereof he was compelled to leave his house and go and reside with the respondents.

Upon the testimony taken in the suit, the court below dismissed the complaint at the appellants' costs.

Bradshaw & Moreland and Bonham & Ramsey, for appellants:

Where imbecility of mind and inadequacy of consideration coexist, courts of equity presume that the transaction was fraudulent without other proof. (Willard's Eq. Jur. 203-4; 4 Or. 291.) The defendants, having induced J. G. Parrish to leave his home and put himself under their care and "protection," he being infirm in mind and unable to take care of himself, became his *quasi* guardians, and courts of equity will presume that the deed made during the existence of this confidential relation was obtained by fraud and undue influence, and annul it. (Bigelow on Fraud, 281, 285; Kerr on Fraud, 182; Cadwalader

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v. West, 48 Mo. 483; *Whelan v. Whelan*, 3 Cow. 587; 21 Md. 338; 6 N. Y. 568; 1 Barbour, 408; 31 Id. 9; *Gilmore v. Burch*, 7 Or. 374; *Greenwood v. Cline*, 7 Or. 17; *Huguenin v. Basely*, 2 L. C. in E., part 2, 1184, 1185, 1206, and notes.)

H. & A. M. Hurley and McCain & Fenton, for the respondents:

Mere weakness of mind, if the man be legally *compos mentis*, is no defense to an action founded on the contract, or other acts of such party. (Willard's Eq. 201; 25 N. Y. 70, 71; 8 Id. 358; 68 Id. 148; Dean's Med. Juris. 556; 3 Leading Cases in Equity, 136; 16 Am. Dec. 473, 651, 652; 4 Id. 336.) Weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy or delusion, they can not properly be considered unsound. (Willard's Eq. 201; 25 N. Y. 68.)

A deed, will, or other instrument, will not be set aside on the ground of imbecility, if the party knew perfectly well what he was doing. (Dean's Med. Juris. 564; 3 Leading Cases in Equity, 112.) To establish undue influence it must appear that the opportunity or influence was such as to deprive the testator or grantor of the free exercise of his will, and that it was exerted. (34 N. Y. 155; 68 Id. 152; 66 Id. 145; 70 Id. 394.) Evidence of non-professional witnesses must be based upon acts and declarations. (34 N. Y. 194; Civ. Code, 250, sec. 696.) There must have been undue influence, and there must be evidence that it was exerted. (77 Ill. 397; 68 N. Y. 148; 76 Pa. St. 106.)

The rule of evidence is different where a fiduciary relation exists. In such case—perhaps where consideration is inadequate and parties are greatly unequal in mind by reason of old age or other circumstances—the law might presume undue influence or incapacity, and the *onus probandi* might be on the beneficiary to show the want of undue influence. Where, however, the fiduciary relation does not exist, and where the consideration is adequate and the parties competent to contract, the burden of proof is on the contestants, and the undue influence must clearly appear. (2 Selden,

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268; 66 Pa. St. 292; 2 Johns. Ch. 22; 1 Redfield, 535, sec. 38, n. 22, 34; 1 Story's Eq. sec. 238.)

By the Court, BOISE, J.:

This being a proceeding seeking to set aside a deed, alleging as a reason that the grantor (who was the father of the plaintiffs) was, at the time he executed the deed, old and of weak mind, and that he was overpersuaded and made the deed under undue influence exerted over him by the defendants, it will be necessary, in order to arrive at a just understanding of the merits of the transaction, to look into the history of the case. It appears from the testimony, that J. G. Parrish, deceased, the grantor in this deed, some fourteen years before the execution of the deed, had some difficulty with his wife, with whom he had lived many years, and who is the mother of the appellants, and was divorced from her; that some time after the divorce, he went to live with his son, W. H. Parrish, with whom his divorced wife was living; that he gave to his son William, a farm, and agreed to reside with him as long as he lived. He became dissatisfied with the treatment he received with his son and divorced wife, and sought to find some one to go on the farm now in controversy, in order that he might make a home there. After trying several persons, he got the respondents to go on the farm, and he soon went there. This was in January, 1874. He lived with them until he died, on November 10, 1876. This deed was executed March 14, 1876. It is claimed by the respondents that before they went on this farm, J. G. Parrish, the grantor, agreed to give them the farm for taking care of him during life, and that this deed was executed in fulfillment of this agreement. The proposition is disputed by the appellants, and there is some conflict of testimony on this subject. The question as to the time when the contract to make the deed was concluded, is left in some doubt; but this issue is not very material in the case, and can have no other significance in enabling us to come to a correct conclusion on the merits of this controversy than this: If it was fully established that the bargain was fully entered into in 1874, it would appear that the

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grantor had long contemplated making the deed, and that the act was more fully considered than if entered into at the time when the deed was executed.

In order to set this deed aside for undue influence, it must be shown by the appellants that the grantor's mind was weak, and that undue influence was exerted over him, and that it was the undue influence which caused him to execute the deed, so that it was not his free act. (68 N. Y. 148; 76 Pa. St. 106; 77 Ill. 397.) It appears in this case that there was a sufficient inducement for making the deed resulting from the desire of the grantor to remove himself from a home which had become disagreeable to him. This was a valuable consideration, and the evidence clearly establishes the fact that he did desire to remove from the house of his son. The evidence as to the state of his mind at the time he executed the deed is conflicting. The weight of the testimony is in favor of the proposition that he was capable of fully understanding the transaction, and the effect of the deed and of the life lease which he took to secure his maintenance. Mr. Corey, the magistrate who drew the deed and life lease, is probably the most intelligent witness to that transaction, and had the best opportunity to observe his capacity. He testifies that the grantor was competent. We think the weight of the testimony is in favor of the proposition that he was competent, and that he executed the deed of his own free will.

Many witnesses testify to the declarations of the grantor, to the effect that he was dissatisfied with his treatment at his son's house, and that he was satisfied with the treatment at Leabo's. The number of witnesses who testify to the fact that he was competent to contract at the time he made the deed is much greater than those who express a contrary opinion, and they are equally as intelligible and creditable. The evidence all taken together does not establish the proposition that the deed was executed either without consideration or under undue influence.

The decree of the circuit court will be affirmed with costs.

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12	295
14	574
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13 th	446

MARY E. BARRETT, APPELLANT, *v.* XARIFA J. FAILING, RESPONDENT.

RES ADJUDICATA.—The judgment of a court of competent jurisdiction is not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not.

IDEA—PAROL EVIDENCE NOT ADMISSIBLE TO SHOW THAT QUESTION WAS WITHDRAWN.—In a suit or proceeding to recover property or its value when the plea of a former adjudication is interposed by the defendant, the plaintiff will not be permitted to offer parol evidence to show that an issue made by the pleadings in the former suit was withdrawn from the consideration of a referee before whom it was tried.

APPEAL from Multnomah County. The facts are stated in the opinion.

O. P. Mason and W. Scott Beebe, for appellant.

Wm. Strong & Sons, for respondent.

By the Court, **KELLY, C. J.:**

On the eighteenth day of February, 1871, Mary E. Barrett, the above-named appellant, recovered a judgment against Charles Barrett in the circuit court of the state, for the county of Multnomah, in the sum of five thousand nine hundred and twenty-one dollars and thirty-two cents and forty-six dollars and thirty cents costs. The foundation of the action was a decree for alimony in a divorce case prosecuted in the state of California wherein the said Mary E. obtained a divorce from the said Charles Barrett.

On the first of November, 1873, Charles Barrett died, leaving the judgment entirely unsatisfied, but at the time of his death there was pending against him and Xarifa J. Failing, then Barrett, a suit in equity to set aside as fraudulent a certain conveyance of real property and a sale of personal property—the same that is in question in this proceeding. The result of that suit was the securing of a payment on the judgment of three thousand and sixty-four dollars and forty-seven cents on the first day of May, 1876. On the tenth of August, 1878, the appellant obtained leave to issue an execution on the judgment for seven thousand three hundred and thirty-five dollars and sixty-seven cents, that being the

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amount then due. Execution was issued on the judgment against Charles Barrett, who was then dead; upon which a garnishee process was served on X. J. Failing, the respondent, on the thirteenth of August, 1878, in accordance with the provisions of sections 308 and 309 of the civil code. Written allegations and interrogatories were filed by the plaintiff, which the garnishee was required to answer by an order of the judge of the circuit court. Among these allegations, the principal one charged that on or about the — day of November, 1870, the said Charles Barrett, with the intent to delay, cheat, and defraud his creditors, particularly the plaintiff, and to prevent her from collecting her said judgment, transferred and delivered to the said Xarifa J. Failing, at the city of Portland, all his property, to wit, the said goods and chattels, fixtures, etc., known as the Barrett bookstore, worth fifteen thousand dollars, and that she received the possession thereof with full knowledge of all the facts herein stated.

On the fifth day of December, 1878, the garnishee, X. J. Failing, filed her answer denying all the allegations of fraud, and averring that the property so received by her from Charles Barrett was of no greater value than three thousand dollars, and that she received and paid for the same in good faith. She then, for a further answer, alleged that on the second day of June, 1871, the said plaintiff commenced a suit in the circuit court for Multnomah county against the said Charles Barrett and this garnishee, in which suit the plaintiff sought to set aside the same sale and transfer of personal property which is set forth in the plaintiff's allegations in these proceedings; that she asked in substance and effect that the sale and transfer of the personal property known as the Barrett bookstore, etc., from the said Charles Barrett to this garnishee, on the fourteenth day of September, 1870 (described herein as of about the — day of November, 1870), might be declared fraudulent and void as against her, and that the garnishee be decreed to account for all the said property; that she, the said garnishee, answered the said complaint, and it was made one of the issues in the said suit in equity, whether or not the said transfer

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of personal property to this garnishee was fraudulent and void, and whether or not the said plaintiff was entitled to have the said property or its proceeds applied to the payment of the said judgment against Charles Barrett.

The garnishee then alleges that the said suit was referred by the circuit court to E. C. Bronaugh, who was appointed a referee to take testimony; that the referee took the testimony upon all the issues in said suit in relation to the sale and transfer of the said Barrett bookstore, and on the twenty-second of September, 1873, made his report thereon to the effect that the sale and delivery of the said personal property to this garnishee, on the fourteenth of September, 1870, was not fraudulent and void, and that this report, so far as it relates to the personal property, was not excepted to, and on the eighth day of June, 1874, the said circuit court adjudged and decreed that the findings of said referee, in reference to the said personal property, should in all things be confirmed.

The plaintiff (appellant), on December 17, 1878, filed a reply, and on January 25, 1879, an amended reply, in which, among other things, she makes a denial substantially as follows: "And in reply to the further and separate answer of the said Xarifa J. Failing, to wit, the allegations of a former adjudication of the subject-matter of this proceeding, this plaintiff alleges that it is not true that the subject-matter of this proceeding was, in the suit commenced on the second day of June, 1871, or at any other time, adjudicated in any manner, and that there was not, at any time during the pendency of said suit, any evidence offered or taken by said referee, or introduced by either party to said suit, of the subject-matter in this proceeding, to wit, the said bookstore; denies that any evidence was introduced before or received by said referee, at any time, relating to the transfer, sale, or delivery of the subject-matter of this proceeding, to wit, the bookstore in controversy, or the rights of the garnishee; denies that the referee passed on the same, and alleges that, long before the finding of said referee therein, and before any trial thereof, this plaintiff, by her attorney, expressly and without objection

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from either of the defendants therein, and with the consent of said Xarifa J. Failing and her attorney, abandoned and withdrew from said suit all claim to personal property, which is the subject-matter of these proceedings, and no objection was made to the withdrawal by said Xarifa J. Failing (the garnishee herein) or her attorneys; denies that the referee passed upon or found any fact or law upon the matter herein sought to be litigated in said suit, or in any suit; denies that on the twenty-second of September, 1873, or at any time, the said referee made or filed any finding of fact or conclusion of law to the effect that said sale of personal property was not fraudulent and void; and denies that the circuit court at any time rendered any decree that the finding of the referee in reference to the personal property described herein should be or was confirmed, adjudged, or passed upon."

There are other defenses interposed by the garnishee, but it is unnecessary to present or consider them, as the view we take of the defense of a former adjudication disposes of this proceeding.

Upon filing the reply, the respondent, by her counsel, moved the court for judgment and decree upon the pleadings, and that the proceedings against the garnishee be dismissed; which motion was sustained by the court, and a decree entered accordingly.

From the answer filed in this case, it appears that on the fourteenth day of September, 1870, a suit in equity was commenced by the appellant, Mary E. Barrett, against Charles Barrett, and Xarifa J. Failing, the respondent herein, to set aside the sale of certain property, including the Barrett bookstore, made by Charles Barrett to the respondent, because the same was made to defraud the creditors of said Charles Barrett. An answer was made in that suit by the respondent, denying the fraudulent sale. It is not denied by the appellant that the suit was concerning the subject-matter of this proceeding. Nor is it denied that the issue presented by the pleadings in that case was the same in regard to the Barrett bookstore as that now presented for consideration in this proceeding. The appellee

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lant, in her reply, alleges that so far as the Barrett book-store was concerned, the same was expressly withdrawn by her attorney from the consideration of the referee appointed in the suit in equity; that no evidence was offered or received before the said referee in regard to this issue made by the pleadings in that suit; that it was withdrawn from the consideration of the referee without objection from either of the defendants, and with the consent of the said Xarifa J. Failing, and that her attorney in that suit abandoned and withdrew from the said suit all claim to the personal property which is the subject-matter of this proceeding; that there was no finding by the referee or decree made by the court in regard to the matter now in controversy in this proceeding.

These matters set forth in the reply can not be considered as any defense to the allegation of a former adjudication set up in the answer, because it does not appear that the withdrawal of the litigation concerning the bookstore from the consideration of the referee was entered upon the record, or made a matter of record in the suit in equity. It is well settled that parol evidence can not be admitted to show that any issue presented by the pleadings in a former action or suit was withdrawn from the consideration of the court. The rule is that the judgment of a court of competent jurisdiction is not only conclusive on all questions not actually and formally litigated, but as to all questions within the issue, whether formally litigated or not. (*Bellinger v. Croigne*, 31 Barb. 537.)

In the case of *Davis v. Talcott* (12 N. Y. 184), where the defendant, in his answer, alleged that the matter in controversy had been adjudicated in a former action, and the plaintiff replied, alleging "that on the trial of the former action, the defendant therein withdrew from the consideration of the referee before whom it was tried, the matters alleged in the complaint in the second suit, and that the same did not pass into or form any part of the judgment rendered in that action," it was held by the court of appeals that the plaintiff could not be permitted to prove that on the trial of the former suit, before the referee, no

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evidence was offered or introduced, on the part of the defendant in that action, to prove or establish the claim for damages set up by way of recoupment in the answer therein, but that, on the contrary, the defendant in that suit, on the trial thereof, expressly withdrew from the consideration of the referee the whole and every part of such claim. Gardiner, C. J., delivering the opinion of the court, said: "The learned judge who tried this cause erred in determining that the judgment in the first suit between these parties was not a bar to the present action, and in permitting the legal effect of the record to be explained or qualified by parol evidence of what then occurred before the referee."

In the case of *Underwood v. French* (6 Or. 66), where the plaintiff sought to recover damages for the breach of a contract, and the plea of a former adjudication was interposed by the defendant, it was held by this court that where it appeared, from an inspection of the record in the former action, that the same cause of action was presented in the former suit, and an issue joined thereon, the whole must be considered as *res adjudicata*, and that parol evidence would not be permitted to show that an issue joined by the pleadings was not tried by the evidence. This rule is applicable to suits in equity, as well as to actions at law. (1 Johns. Cas. 492.)

According to the law, as declared in these cases, if this proceeding were now before the circuit court for trial upon the issues presented in the pleadings, the appellant would not be permitted to offer any evidence outside of the record itself to prove the allegations in her reply as to the withdrawal of the matters now in litigation from the consideration of the referee, and necessarily the matters herein sought to be litigated would have to be considered as *res adjudicata*.

Under the views herein taken, it becomes unnecessary to consider the other assignments of error. The decree of the court below is affirmed.

Statement of Facts.

8	158
23	246
24	14
31*	650
32*	679

8	158
27	203

**JOHN L. KRUSE AND CHAS. S. MOORE, APPELLANTS,
v. C. W. PRINDLE, RESPONDENT.**

Two CONVEYANCES EXECUTED AT THE SAME TIME between the same parties, and relating to the same subject-matter, should be construed together as forming parts of a single conveyance.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—BURDEN OF PROOF.—A creditor may make an assignment of his property in trust with a provision that it be converted into money, and the proceeds thereof distributed equally among his creditors, excepting such as may be secured by mortgage, and when such assignment is attached for fraud and illegality by a creditor, the *onus* is upon him to establish the fraud and illegality by proof, and in order to defeat it on that ground, it must be shown that the assignor and assignee both participated in the fraud.

APPEAL from Clackamas County.

One Thomas Robertson, having a mortgage upon certain real property, brought a suit of foreclosure against D. W. Williams, the mortgagor. Subsequent to the Robertson mortgage and on June 13, 1877, Williams, the mortgagor, had, so it was claimed, conveyed the mortgaged property to one C. W. Prindle, in trust for the benefit of his creditors. After the so-called trust conveyance to Prindle, and on November 10, 1877, one Kruse and one Moore obtained judgments against Williams and one Wittenberg. These judgments were rendered upon promissory notes executed by Williams and Wittenberg long prior to the conveyance to Prindle. In the Robertson foreclosure suit, Prindle, Kruse, and Moore were made parties defendant with Williams. The property was sold upon Robertson's foreclosure, and Robertson's mortgage paid. There then remained a surplus amounting to two thousand and seven hundred dollars. This suit relates to the distribution of this surplus. Prindle claimed under his alleged trust deed, while Kruse and Moore claimed a prior lien by virtue of their judgments of November 10, 1877.

The facts relating to the trust to Prindle are as follows: Williams executed a conveyance to the premises in question on the thirteenth of June, 1877, to Prindle in the usual form, and reciting that it was in consideration of one dollar,

Argument for Appellants.

"and other valuable consideration." This instrument was sealed, witnessed, and acknowledged in due form. On the same day Williams executed another instrument without seal or acknowledgment, which purported to convey the same premises to Prindle in trust for the payment of Williams' debts, giving preference to unsecured creditors.

It was claimed in behalf of Prindle that these two instruments were in effect one, and that they convey the premises to Prindle in trust for the creditors. It was claimed in behalf of Kruse and Moore, that the two instruments should not be construed together; that the deed was without consideration and is void as to creditors; that the instrument declaring the trust was a mere assignment in writing, and being without seal or acknowledgment, was inoperative; that at the time of making the conveyance Williams and Wittenberg were insolvent, and Prindle knew it, and that the conveyance was made to defraud Kruse and Moore. Williams had other property at the time of the conveyance.

The court ordered the surplus distributed as provided in the trust instrument, except that Kruse and Moore, who were not named in the list of creditors annexed thereto, should take *pro rata* with the other creditors. From this decree Kruse and Moore appealed.

F. O. McCown and Richard Williams, for appellants:

The deed from Williams and wife to Prindle did not create a trust against parties without notice. (Misc. Laws, sec. 771, 264; Hill on Trustees, 57, 112, 114, 117.) Kruse never had any notice of the paper in pleadings marked Exhibit "A," until it was filed, and if it is held to come within the statute of frauds, it certainly could not affect Kruse without notice. There is not a single word in the deed to indicate in the remotest degree that Prindle was charged with a trust as to the land.

When a deed purports to be an absolute conveyance in terms, "but is made, or is intended to be made, defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected as against any person other than the

Argument for Respondent.

maker of the defeasance, or his heirs or devisees or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded." (Misc. Laws, sec. 28, 519; 3 Wend. 208; 12 Mass. 456; 38 Maine, 447.) As a matter of law the deed of defeasance should have been executed with the same formality as the original deed. (13 Mass. 543; 22 Pick. 526; 7 Watts, Penn. 261; 8 Maine, 43, 206; 1 Bouv. Law Dictionary, 477.).

In conclusion, we insist that it clearly appears in this case that Kruse and Moore loaned their money to Williams and Wittenberg; that they used due diligence to enforce the collection of the same, and obtained a lien by judgment on Williams' property; that Williams undertook to defeat its collection by an assignment to Prindle; that Prindle knew it; that it does not appear that there are any other creditors interested; that Prindle does not attempt to show, nor is it pretended to be shown, that there is another single individual interested in Williams' estate; that he does not claim that he is the legal owner of the land in question; that all the acts of Prindle and Williams were a fraud on the rights of Kruse and Moore; and that the defendants, Kruse and Moore, come into court with clean hands, and ask of the court that the wrongful and fraudulent acts of Prindle and Williams may be set aside, and their just claims paid.

Catlin, Killen & Nicholas, for respondent:

The question in construing an instrument is not whether a fraud may be committed by the assignee, but whether the provisions of the instrument are such that when carried out according to their apparent and reasonable intent they will be fraudulent in their operation? (Bump on Frd. Conv. 369, and cases there cited.) The property may be conveyed by deed and the trust created or declared by a separate instrument in writing subscribed by the party creating or declaring the trust. (Adams' Equity, 147, and note 2; 6 Cow. 705, 725.) No schedule, either of the creditors or property, need be annexed, unless preferences are made or release required. (Bump on Frd. Conv. 347, 348; 7 Pet. 608-614 (Curtis); 4 Mason, 206, 220.)

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It is not necessary to have assent of creditors to the assignment. They are presumed to assent. It is not material whether or not the beneficiaries are apprised of the conveyances. (Bump on Frd. Conv. 339, 340. The assignment should not contain a provision for creditors to sign it, or to become parties to it. (Id. 340.) An exception in the deed, whereby a portion of the property of the insolvent is not conveyed, does not render the assignment void. (*Carpenter v. Underwood*, 19 N.Y. 520, 521.) The deed need not convey all the debtor's property. (21 N.Y. 25.)

Williams had a right to prefer creditors, though the preference would defeat all others. (Bump on Frd. Conv. 304; 11 Wheat. 78.) Assent of creditors to the assignment is presumed, and the refusal of a portion of creditors does not render deed void. (Bump, 342; 4 Mason, 217.) "It is not sufficient to invalidate an assignment that the debtor, at the time of making it, is embarrassed or executes it voluntarily or without the request or knowledge of the creditors. It is not necessary that the creditors shall be consulted or that the fact shall appear upon the face of the deed. The assignment may convey all the debtor's property. It need not convey at all." (Bump on Frd. Conv. 371.) The right to make an assignment is an incident to the ownership of property. (7 Pet. 614.)

Intent to hinder and delay creditors; what necessary. (Bump on Frd. Conv. 356; 4 B. Monroe, 430, 431.) Fraudulent intent; what is. (Id. 362.) The fraud must be in the beginning. (Id.) Fraudulent intent upon the part of the debtor alone is not sufficient. Either the assignee or creditors must participate in the fraud to render the conveyance void. (Bump on Frd. Conv. 363; *Bonser v. Miller*, 5 Og. 110.) The assignment is upon a valuable consideration. (Bump on Frd. Conv. 363, 364, 556; 4 Mason, 214.)

By the Court, PRIM, J.:

The only questions presented here for determination are:
1. Did Williams and Prindle collude and conspire together and cause the said conveyance to be made for the purpose

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of defrauding Kruse and Moore, and to prevent them from collecting their debts? 2. Was the said conveyance made without consideration? The facts developed in this case show that both of these questions should be answered and determined in the negative.

The appellants having charged Williams and Prindle with collusion and conspiracy in procuring this conveyance to be made for the purpose of defrauding and preventing them from collecting their debts, the *onus* is upon them to prove it by legal and competent evidence. This they have failed to do. (Bump on Frd. Conv. 368.) These conveyances having been made and executed on the same day, and between the same parties, and relating to the same subject-matter, should be treated and considered together as one instrument. (*Cornell v. Todd*, 2 Denio, 130.)

In this case the evidence not only fails to show collusion and conspiracy between Williams and Prindle with intent to delay or defraud the appellants, but on the contrary, it shows that Williams was an insolvent debtor, and that these conveyances were executed for the purpose of making an equal distribution of the proceeds of his property among his creditors. The fact that such creditors as were secured by mortgage were preferred in said assignment, did not vitiate and render the same void, as under the law a debtor has the right to prefer one creditor to another. (Bump on Frd. Conv. 344; 11 Wend. 241; 3 Paige, 537; 11 Wheaton, 556.)

A special defense is made in the answer of Prindle against the claim of Kruse, upon the ground that the assignor, Williams, was, in fact, surety in that case, and that the debt was secured by a chattel mortgage, which Kruse had failed to enforce, by which he was released as such surety. In the recorded deed, the considerations recited are one dollar, and other valuable considerations, which have been fully shown in this case.

It was urged, on the argument of the case, that Williams had no interest in the property to assign after having executed the recorded deed. We regard that argument as extremely technical, and entitled to no weight, and especially

Argument for Appellants.

when we find that they were both executed at the same time. There being no evidence showing fraud in the execution or delivery of these deeds of assignment, either on the part of the assignor or assignee, they should be upheld and sustained by a court of equity.

The decree of the court below is affirmed.

GEORGE HOLSTINE, RESPONDENT, *v.* THE OREGON AND CALIFORNIA RAILROAD COMPANY, APPELLANT.

EVIDENCE—VALUE OF PROPERTY, PURCHASE PRICE NOT MATERIAL.—In an action to recover the value of horses killed by a railroad, the plaintiff, testifying as to the value of the horses, stated on cross-examination that he bought and paid for them in sheep at a stated price. The defendant then asked where he got the sheep, how much he paid for them, and whether they had been sheared: *Held*, that such questions were irrelevant. **SLIGHT NEGLIGENCE** will not prevent a recovery, if the negligence complained of has been gross.

APPEAL from Clackamas County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Simon, for appellants:

The court erred in instructing the jury as follows: "If the company was guilty of gross negligence, and the plaintiff was guilty of slight negligence, or if the agents of the company were willfully or intentionally negligent, then the plaintiff is entitled to recover, notwithstanding his own negligence."

The rule upon this subject is thus stated in Sherman & Redfield on Negligence: "It has been held, in some cases, that the plaintiff's slight or ordinary negligence is no defense where the defendant has been guilty of gross negligence. But this exception to the rule was in part founded upon the idea that gross negligence was equivalent to fraud or malice, which we have already shown to be contrary to both principle and authority. And it is now generally held in the most important courts of America, that the degree of the defendant's negligence is immaterial in determining questions of contributing negligence."

Argument for Appellants.

It is contended that this court, in *Bequet v. The People's Trans. Co.* (2 Or. 200), adopted a different rule. We are free to confess that we think the decision in that case erroneous; and if a distinction does not exist between "the least negligence," which is the language used in the instruction asked, and in the opinion of the court in that case—and "slight negligence," which is the term used by the court in the instruction given in the case at bar—we ask the court to adopt the rule upon this subject which prevails in all but two of the states of the Union, notwithstanding the case of *Bequet v. The People's Trans. Co.* In fact, this court has already, as it appears to us in the subsequent cases of *Stone v. The Oregon City Manufacturing Co.*, 4 Or. 52, and *Cogswell v. The Railroad Co.*, 6 Id. 417, followed the rule as above quoted from Sherman and Redfield.

The court erred in refusing to instruct the jury, as requested by the defendant, that certain facts, if found by the jury from the testimony to exist, constituted negligence which would preclude the plaintiff from recovering. The general rule on this subject is briefly stated thus in Sherman and Redfield upon Negligence (sec. 1.): "The question whether a party has been negligent in a particular case is one of mingled law and fact. It involves, indeed, two questions—(1) Whether a particular act has been performed or omitted; and (2) Whether the performance or omission of this act was a breach of legal duty. The first of these is a pure question of fact, the second a pure question of law."

Of course to this rule, as to all general rules, some modification exists; but we insist that in this case it was the duty of the court to determine whether if the facts stated in the instruction asked were found to exist, they constituted negligence; and if a jury whose sympathies are all with the plaintiff, are told that if the plaintiff is guilty of slight negligence and the defendant of gross negligence, the plaintiff can still recover; and are then told that they may find not only whether the facts exist which it is claimed constitute negligence, but also whether the facts, if found, do constitute negligence, parties might as well try their cases without the assistance of the court. In the following cases the

Argument for Respondent.

court instructed the jury that if certain facts were found by them to exist, such facts would constitute negligence, or the refusal to so instruct was held to be error. (*Finlayson v. Railroad Co.*, 1 Dillon, 584; *Stone v. The Oregon City Mfg. Co.*, 4 Or. 53; *Illinois Central R. R. Co. v. Buckner*, 28 Ill. 299; *Artz v. The Chicago and P. R. R. Co.*, 34 Iowa, 153; *Wilcox v. Railroad Co.*, 39 N. Y. 358.) And in the following cases, the facts being clear or undisputed, which it was claimed constituted negligence on the part of the plaintiff, and which in the opinion of the court, as matter of law, precluded a recovery, the court granted a nonsuit: *Cogswell v. O. & C. R. R. Co.*, 6 Or. 419; *McGlynn v. Brodie*, 31 Cal. 376; *Wilds v. The H. R. R. Co.*, 29 N. Y. 315; *Gonzales v. N. Y. & Harlem R. R. Co.*, 38 Id. 432; *Deyo v. N. Y. Central R. R. Co.*, 34 Id. 9.

R. Williams, for respondent:

The instruction given by the court was correct. If the company was guilty of gross negligence, or if the agents of the company were willfully or intentionally negligent, the plaintiff would be entitled to recover, notwithstanding he was guilty of slight negligence. (*Bequet v. P. T. Co.*, 2 Or. 200; *The Peoria, etc. R. R. Co. v. Champ*, 75 Ill. 577.) But this was not the entire charge of the court upon this subject, as a reference to the charge will show.

The instruction asked by defendants' counsel was properly rejected. It required the court to say to the jury, not that the circumstances mentioned (which was only a portion of the evidence bearing upon the point presented) in the charge asked might be considered by the jury, in determining whether the plaintiff was guilty of contributory negligence, but that these circumstances conclusively proved negligence on the part on the plaintiff, which contributed to the injury to such an extent as to prevent his recovery. This is in direct violation of sections 198 and 835 of the code of civil procedure. It was proper for the court to refuse to give the instruction as asked, and to qualify or explain the same before giving it to the jury. (*Knapp, Burrell & Co. v. Sol King*, 6 Or. 243.

Argument for Respondent.

The following is the charge of the court to the jury upon the question of negligence: "The plaintiff had a right to be where he was on the highway, so also the defendant had a right to be upon the track in question with his locomotive and train, and to be using it in the manner described. The question is, Could either party, that is to say, the plaintiff and the agents of the company having the train in charge, have prevented the accident by the exercise of such care as the circumstances surrounding them required? In all cases the law requires of each party the exercise of ordinary care. The railroad company is required in all cases to exercise this care. Persons having occasion to pass and repass in the vicinity where trains are accustomed to pass, are also required to exercise this care. The more dangerous the locality the greater is the degree of care required. A greater degree of care is required of the company where its trains are passing along near to a public highway or thoroughfare, or crossing where people are at all times passing and repassing, than is required when they are not near to such a highway or public place; and at the same time the same doctrine holds those who travel about where trains are frequently passing, to greater diligence than is required of them at other times. I leave you to consider, as men of judgment and experience, what degree of care was required in this case, subject to the general rule which I have stated. If you find that the company failed to exercise that care which the circumstances required of them, and that the accident resulted as a consequence, then the company is liable, unless the plaintiff also failed to exercise proper care, and by his failure contributed to the injury. If both parties were negligent, and the negligence of both contributed to the injury, there can be no recovery. The law can not apportion the responsibility among those who are jointly responsible. If, therefore, as I have stated, the plaintiff by his own negligence contributed to his injury, he can not recover. If, however, the negligence of the plaintiff—if he was negligent—did not contribute to the injury; if the company was guilty of gross negligence, and the plaintiff was guilty only of slight negligence, or if the agents of the

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company were willfully or intentionally negligent, then the plaintiff is entitled to recover notwithstanding his own negligence."

By the Court, KELLY, C. J.:

This is an action brought by the respondent to recover damages for the killing of some horses and injury to others by a freight train on appellant's railroad, alleged to have been caused by the negligence of the appellant. In the answer, negligence on part of the appellant is denied, and negligence upon the part of the respondent, which contributed to the injury, is averred.

The facts are substantially as follows: In October, 1878, the respondent was the owner of a band of eleven horses, which he was driving along the county road leading from Oregon city to Salem. When about half a mile above Canemah, where the county road runs parallel with and near to the railroad track, but separated by a board fence, he met a freight train going north. The respondent was riding a horse and driving the eleven head. The horses which he was driving became frightened and ran back along the county road until they reached the place where it crosses the railroad below Canemah, a distance of more than a mile. At this crossing a part of the horses ran on the railroad track before the train, and three of them were killed, and one injured so that it afterward died, and the others were injured to some extent. The horses had recently been brought from Eastern Oregon and were unaccustomed to the sight of a railroad, and at the time they took fright the eleven head were driven loose by the respondent, who had no one to assist him. When they became frightened they were about one hundred yards ahead of respondent, and he was watching two boats on the Willamette river.

During the trial the respondent was a witness in his own behalf, and after describing the horses which were killed and injured he was questioned by his counsel about the value of the horses, as follows: "What was the value of the two bay horses?" to which he answered: "I paid three hundred and fifty dollars for them." "What was the value

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of the dun horse?" to which he answered: "I paid one hundred and fifty dollars for him." The respondent also afterwards testified in effect that such horses were respectively worth the sums which he stated he paid for them. Although the above answers were objectionable, because not responsive to the questions asked, yet no exception was taken.

On cross-examination the respondent stated that he had bought the horses in Baker county, Oregon, from one Toney, about September, 1878, and did not pay for them in money, but paid for them in sheep at the rate of two dollars for each sheep, receiving the horses at the prices above specified. Appellant's counsel then asked the witness the following questions, which were severally objected to by respondent as immaterial, and the objections were sustained by the court, to which rulings appellant excepted: "Where did you get the sheep you traded for the horses you bought of Ben Toney? How much did you pay for the sheep you traded to Ben Toney for the horses, and in what manner and when did you pay it? Where were the sheep at the time you traded them to Toney, and how long had you owned them? When had the sheep you traded to Toney for the horses been sheared? Where had the sheep you traded to Toney for the horses been kept the summer you traded, and how had they been kept?"

The court properly sustained the objections to these several questions. The inquiry was as to the value of the horses, about which the witness had testified. On the cross-examination he stated that he had traded sheep in payment for them at a stipulated price, and by the questions asked it was sought to elicit facts too remotely connected with the subject of inquiry before the court.

After the evidence was closed the court charged the jury, among other things, as follows: "If both parties were negligent, and the negligence of both contributed to the injury, there can be no recovery. The law can not apportion the responsibility among those who are jointly responsible. If, therefore, as I have stated, the plaintiff by his own negligence contributed to his injury, he can not recover. If,

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however, the negligence of the plaintiff, if he was negligent, did not contribute to the injury; if the company was guilty of gross negligence and the plaintiff was guilty only of slight negligence, or if the agents of the company were willfully or intentionally negligent, then the plaintiff is entitled to recover notwithstanding his own negligence." The appellant excepted to the following portion of the charge just quoted: "If the company was guilty of gross negligence, or if the agents of the company were willfully or intentionally negligent, then the plaintiff is entitled to recover notwithstanding his own negligence."

This being excepted to, it was assigned as error. This must be taken in connection with the context, and so taken it was not erroneous. This court, in the case of *Bequet v. The People's Transportation Co.* (2 Or. 200), laid down the rule that slight negligence on the part of the plaintiff would not excuse gross negligence on part of the defendant, whereby the plaintiff's property was destroyed. The ruling of the court below, in the case under consideration, was in accordance with the principle declared in that decision.

On behalf of the appellant the court was asked to instruct the jury as follows: "If the jury find from the evidence that the plaintiff was driving a band of eleven horses loose upon the highway, in known proximity to the railroad of the defendant, knowing that his horses were not accustomed to the sound or sight of a railroad train, at about the time for the passing of a regular train, and permitted the horses to get the distance of a hundred yards in advance of him, and was watching some steamboats upon the river, and, while so occupied, a train approached and said horses took fright, which caused them to run into the train, by which a portion of the band was killed and others injured, he is guilty of such contributory negligence as prohibits his recovery, unless the defendant was guilty of willful misconduct." This instruction was asked on the hypothesis that the respondent was bound to know when the regular freight trains of the appellant would pass along close to the place where the horses took fright, and that he had no right to travel on the

Statement of Facts.

public highway with horses unaccustomed to the sight or the sound of a railroad train.

The respondent was under no obligation to ascertain the exact time when the freight trains would pass along the railroad and to abstain from driving his horses on the highway when these trains should go by. He had a right to be on the public road, and if he exercised ordinary prudence and care in driving his horses he would not be liable to the charge of being negligent in the management of his property.

The court did not err in refusing to give the instruction which was asked, and the judgment is affirmed.

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7* 308

HORATIO COOK, APPELLANT, v. MULTNOMAH COUNTY, RESPONDENT.

CORONER'S FEES—SUMMONING A JURY.—Where in a statement of expenses of a coroner's inquest returned by the coroner to the county court, said coroner has charged five dollars for summoning a jury, the court may, in its discretion, allow a less sum.

IDEM—COUNTY COURT MAY ALLOW IN ITS DISCRETION.—No fee is fixed by the statute for the coroner for summoning a jury of inquest. The county court may fix the compensation in such case. The finding and order of such county court, in such a case, is not the subject of a writ of review.

APPEAL from Multnomah County.

The appellant presented the following bill to the county court for holding an inquest: Holding inquest, five dollars, summoning jurors, five dollars; swearing jurors, sixty cents; summoning and swearing nine witnesses, seven dollars and fifty cents; deposition of fourteen folios, three dollars and fifty cents; mileage, twenty cents; bringing corpse to morgue, three dollars. The county court refused to allow the item of five dollars for summoning a jury, but allowed two dollars and twenty cents for such service. The rest of the bill was allowed. A writ was brought by the coroner to review the order of allowance. Upon the hearing, the circuit court dismissed the writ, whereupon the appeal was taken.

Opinion of the Court—Boise, J.

Woodward & Woodward, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for the State.

By the Court, BOISE, J.:

The question presented in this case must be determined by the construction of certain sections of the statute. Section 5, on page 603, which provides that the coroner's fee for taking an inquest concerning the death or wounding of any person, shall be five dollars, has reference to his service for holding the inquest; that is, for presiding at and conducting the inquest, and does not include his services or expenses in summoning a jury, or witnesses. When he summons a jury or witnesses, he does it in his capacity as coroner, and not as sheriff, for he only acts as sheriff in such cases as the statute has provided for, where he executes process in cases where the sheriff is disqualified.

The duties of coroners in taking an inquest are defined and regulated by statute in chapter 39, and all their duties and powers relating thereto, are there specified. Section 463 of said chapter provides that "the coroner must return to the county court a written statement, verified by his own oath, of the expense of any inquest or burial made by him, which account must be audited and paid to the persons to whom the items thereof are due, in the same manner as ordinary claims against the county."

This item for summoning a jury was one of the expenses of the inquest, the same as the summoning of witnesses, and was to be audited. It was so presented in this case, and there being no statute expressly providing what sum should be allowed, it was the duty of the county court, under the power conferred on them by said section, to allow such compensation as was reasonable, and such county court could take evidence to determine the propriety or amount of any item contained in the statement made to them by the coroner. Their finding on any of these items as to the proper amount to be allowed, could not be reviewed by the circuit court, nor can it be by this court.

Opinion of the Court—PRIM, J.

We think, therefore, that the allowance made in this case for summoning the jury, is not the subject of review, and that the writ of review was properly dismissed by the circuit court, and its judgment will be affirmed, with costs.

H. W. DAVIS, ADMINISTRATOR OF THE ESTATE OF WILLIAM A. PERKINS, DECEASED, APPELLANT, *v.* THE OREGON AND CALIFORNIA RAILROAD COMPANY, RESPONDENT.

EVIDENCE OF PRIOR ACCIDENT IN ACTION FOR NEGLIGENCE.—In an action against a railroad company to recover damages for an injury sustained by one of its passengers in consequence of alleged negligence on the part of the company, evidence of another accident having occurred at the same place, under similar circumstances, is inadmissible.

CONTRIBUTORY NEGLIGENCE—DRUNKENNESS—PROXIMATE CAUSE.—Drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the death of the deceased. If the person injured got drunk under such circumstances that any reasonably prudent man could foresee that he was putting himself in such a condition that that which resulted might probably happen, then his drunkenness would be a defense.

IDEML—PASSENGERS, PRESUMPTIONS BY.—A passenger has no right to presume that a ferry boat has landed on account of the chain guard and barriers across the bow of the boat being down, when warned and personally notified at the time by those in charge that a landing had not been made.

APPEAL from Multnomah County. The facts are stated in the opinion.

Sidney Dell, for appellant.

Dolph, Bronaugh, Dolph & Simon, for respondent.

By the Court, PRIM, J.:

This action was brought by the administrator of W. A. Perkins, deceased, against the respondent, to recover damages for the drowning of said intestate, as it is alleged, through the negligence and carelessness of the servants of the respondent.

At the time of the action complained of, the respondent

Opinion of the Court—Prim, J.

was a corporation and in the possession and management of a line of railroad from the city of Salem to the city of Portland, Oregon. It was in the possession and management of cars, and also a steam ferry boat across the Willamette river at Portland, for the purpose of carrying passengers to the end of its line at the latter place. On November 16, 1878, the deceased took passage on the cars of respondent at Salem, to be transported to Portland, having paid the usual fare therefor. While said ferry boat was attempting to make its landing upon the west side of said Willamette river, and before it had done so, the deceased, in attempting to go ashore, stepped off the boat into the river and was drowned.

It is alleged that this accident occurred in consequence of the gross negligence and carelessness of the respondent in this, in failing to have sufficient lights and a chain or other guard across the bow of the boat to prevent passengers from walking off into the river in the night time. It is also charged that there was unskillful management in landing the boat. The negligence and carelessness of the respondent is denied in the answer, and it is further alleged therein, for separate answer, that said accident was wholly caused by the gross negligence and recklessness of said deceased himself; that before the boat had landed he left the passenger cabin upon said boat and walked to the forward end of the deck of said boat, intended to be occupied by teams and vehicles, and not by passengers; that although warned by the servants of respondent, then in charge of said ferry boat, said deceased, in attempting to go ashore before said boat was landed, carelessly stepped off of the boat into the river and was drowned.

The bill of exceptions discloses the following facts: The train arrived at East Portland behind time—at about six o'clock P. M.; it usually arrives there about four, but was delayed that day on account of the freight train being off the track ahead of it at Oregon City. It was dark when it arrived, and the train passengers (Perkins among them) were put upon the ferry boat, to be crossed over to the west side of the Willamette river. There was no chain guard up that night. The watchman had a lantern, and while the boat was

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crossing stood on the bow with his back to the pilot-house and lantern in front of him, to enable the captain to see how to steer. While the boat was attempting to make its landing, and before it had done so, the deceased left the cabin and walked to the bow of the boat, and in attempting to walk ashore stepped into the river, the captain and several others proclaiming in a loud voice that the boat had not landed and telling him to stand back. The evidence also tended to show that he had been drinking, and was intoxicated at the time; that when he attempted to get off at one side of the boat some one took hold of him and turned him back, and that he immediately went to the other side and stepped off; that when he stepped off the bow of the boat it was only two or three feet from the pontoon.

The first error assigned is as follows: 1. The court erred in sustaining the objection to question Jones, one of plaintiff's witnesses, on direct examination, whether or not he knew anything of an accident having happened at the same place on defendant's ferry boat, under similar circumstances, prior to the drowning of Perkins; and, if so, what he knew about the circumstances, and in ruling out said evidence offered.

This evidence was properly rejected by the court. The authorities cited by counsel for appellant to sustain this proposition are inapplicable and fail to support it. Every case of this nature must depend on its own facts and circumstances. If the appellant should be allowed to prove that another accident had occurred there under similar circumstances at some prior date, the other side would have been entitled to inquire into the circumstances of that transaction. The tendency of such evidence would have been to mislead and confuse the jury.

The second and third assignments will be treated together.

2. The court erred in refusing to give the following charge to the jury, as requested by the plaintiff in writing: "Drunkenness is not a defense by way of contributory negligence, unless it was the substantial cause of the injury. The law protects persons who happen to be drunk as tenderly at least as it does persons capable of taking care of themselves."

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3. The court erred in modifying the charge requested, as aforesaid: "Drunkenness is not a defense by way of contributory negligence, unless it was the substantial cause of the injury," by omitting the remainder of said request and by adding the following: "In addition to that, I will say that if the drunkenness was the proximate cause of the death of this person; if he got drunk under such circumstances as any reasonable, prudent man could foresee that he was putting himself in such a condition that this result might probably happen; if he did that under those circumstances, then his drunkenness would be a defense; but the mere fact that he was drunk, unless his drunkenness contributed as a proximate cause, would not be any defense."

The modified instruction given by the court was as favorable to appellant as he was entitled to ask, if not more so. (42 Iowa, 315; 71 Ill. 177.) There was evidence tending to show that the deceased was intoxicated, but no showing that there was any discrimination against him on that account. There was no error in either the second or third assignments.

The only remaining assignment of error is the refusal of the court to give the following charge to the jury, as requested by appellant: "It was the duty of defendant to have some proper means whereby, when their ferry boat landed in the night-time, it could be made known to the passengers whether or not, and when the boat was properly moored; and if, in the absence of any such signal or notice, the passengers were permitted by defendant to pass off from the boat in a dark night, without any reasonable barrier interposed by defendant, the deceased had a right to presume that defendant had safely moored its boat, and to act on that presumption."

In this case, the deceased had no occasion to act on the presumption that the boat had landed when he stepped off, from the fact that the chain guard was down, for the reason that it appears from the evidence reported in the bill of exceptions, that he was then and there warned and informed by the servants of the company, and by several of the passengers, that the boat had not landed, and to stand back.

Opinion of the Court—Prim, J.

In the absence of any such warning and actual information, the instruction, and the authorities cited to support it, would have been applicable.

That part of the instruction relating to the duty of the respondent to furnish all suitable guards and barriers necessary to make a ferry boat safe, had already been given, substantially, in the charge of the court, and it was not error to repeat it. The court charged as follows: "1. It was the defendant's duty towards deceased to use the utmost care and skill of a prudent man, skilled in the particular duty (of a common carrier) which he had in charge. 2. It was defendant's duty to furnish all suitable guards and barriers necessary to make their ferry boat a safe means of transit over the river. 3. When the negligence of the defendant is proximate, and that of deceased is remote, the action can then well be sustained, although the plaintiff or deceased is not entirely without fault. If there be negligence on the part of deceased, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, plaintiff may recover. The law requires greater care where life is in peril, than in other cases affecting rights of less importance; and when a party is rendering service for compensation, the law holds him to a greater degree of care, than it does when the service is rendered gratuitously. Those who render service for compensation are held to great care for the safety of human life. When the contributory negligence of a party is relied upon to prevent his recovery, such negligence, to avail as a defense, must be at least ordinary negligence; the fact that the plaintiff has been guilty of slight negligence, will not defeat his right to recover—no man is required to use more than ordinary care for his own protection."

The principal defense interposed in this case was that the gross carelessness of the deceased was the proximate cause of his death; and there being much testimony disclosed in the bill of exceptions, tending to sustain that defense, the verdict can not be disturbed here.

The judgment is affirmed.

Statement of Facts.

STATE OF OREGON, RESPONDENT, *v.* TOM, A CHINAMAN,
APPELLANT.

CHALLENGE OF JUROR—BILL OF EXCEPTIONS MUST SHOW ALL THE EVIDENCE.—Where the decision of the circuit court on the trial of the challenge of a juror for actual bias is assigned as error, the supreme court will not review such decision, unless it appears in the bill of exceptions that all the evidence adduced on the trial of such challenge in the circuit court is reported to this court.

WITNESS—RAPE—PROSECUTRIX, THOUGH A CHILD, MUST BE SWORDN.—On the trial of a case of rape on a child, where the child is called as a witness, and found by the court not to possess sufficient intelligence to testify as a witness, the declarations of such child as to the circumstances of the alleged rape can not be given in evidence. No person can testify as a witness unless first sworn, unless by the consent of the parties.

APPEAL from Linn County.

The appellant was tried and convicted of the crime of rape, at the March term of the circuit court for Linn county. George Klum was called as a juror, and being challenged for bias, in answer to the usual questions stated, “that he had a fixed opinion as to the guilt or innocence of defendant; that it would take evidence to remove such opinion; that it was founded upon what he had read in the newspapers touching the accusation, and upon statements made to him by persons who professed to detail the facts.” The court denied the challenge.

Lewis Cox was called as a juror, and having been challenged for bias, answered as follows:

Question. Have you formed or expressed an opinion as to the guilt or innocence of the defendant in this cause?

Answer. I have.

Q. Is that a fixed opinion? A. It is.

Q. Would it take evidence to remove that opinion? A. It would.

Q. Upon what is that opinion based? A. Upon what I have read, and upon what I have heard from persons who pretended and professed to detail the facts. There has been a great deal of talk about this case.

The juror was then submitted to the court by appellant's counsel, and the court asked him the following question:

8	177
8	246
9	461
14	513
15	266
21	511
13*	299
14*	423
28*	639
8	177
23	435
31*	1050
8	177
28	326
29	262
8	177
32	113
8	177
646	486

Opinion of the Court—Boise, J.

“Can you try this case fairly and impartially?” Appellant objected to the question, by his counsel. The court overruled the objection, and appellant, by his counsel, excepted; and the juror answered, “I think I can.” Whereupon the court held that said Lewis Cox was a competent juror, and refused to sustain the challenge.

Upon the trial, two witnesses were allowed, against the appellant’s objection, to testify to statements made to them by the prosecutrix, a child five years of age, as to the facts constituting the alleged rape. In the one case, the conversation took place eleven days after the event, and in the other, on the day “the Chinaman was arrested.” The prosecutrix was offered as a witness, and objected to on the ground that her age rendered her incapable of receiving just impressions of the facts to which she was to testify. Thereafter the court allowed her to be examined without being sworn.

R. S. Strahan, L. Flynn, and Bonham & Ramsey, for appellant.

J. J. Whitney, District Attorney, for the state.

By the Court, BOISE, J.:

The first question presented is as to the challenges of the jurors, George Klum and Lewis Cox, for actual bias. To disqualify a juror for actual bias, he must be shown to have a state of mind in reference to the action or party challenging, which satisfies the judge trying the cause, in the exercise of a sound discretion, that the juror can not try the issue impartially. (Code, sec. 183.) “But on the trial of such challenge for actual bias, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause, from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion, and try the issue impartially.” (Code, sec. 185.) These provisions of the statute have somewhat modified the practice from what it was in the matter of trying

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challenges of jurors, and the questions presented in this case must be determined so as to harmonize with these provisions.

The questions propounded to the jurors elicited answers from them, that they had formed opinions as to the guilt or innocence of the prisoner, and that they thought they were fixed opinions, and that it would take evidence to remove them. The opinions were therefore not so fixed that they could not be removed by evidence which should show the facts of the case different from what the jurors had heard them related. This kind of opinions would not, under the rule laid down in section 185 of the code, disqualify a juror, for his opinion could and would be changed if the evidence should show the facts not to be as he had heard them stated. As to whether the juror was impartial or not, was a question to be tried by the court from the evidence before him. Before we can judge whether the discretion exercised by him in overruling the challenges was a sound discretion and properly exercised in this case, we must have all the evidence before us in this court that was adduced on the trial of the challenge in the circuit court.

It does not appear from the bill of exceptions whether or not all the evidence that was before that court has been reported to this court. We can not, therefore, try the challenge here, for this court will not review any question of fact unless all the evidence is reported on which the circuit court based its opinion or finding. If all the evidence adduced in the court below in the trials of these challenges is in the bill of exceptions, that fact should have been stated; and as it is not stated, we must presume that the circuit court had sufficient evidence to support its findings.

The next question presented is as to the objections to the evidence of the declarations of Ruby Sumption, the child on whom the rape was alleged to have been committed. The court held that she was not possessed of sufficient intelligence to receive just impressions of the facts concerning which the counsel for the state proposed to examine her, or of relating them truly. But the court permitted her mother and step-father to detail communications they had had with her, in

Opinion of the Court—Boise, J.

which she related to them facts concerning the conduct of the prisoner towards her, and what he said and did to her at the time and in the commission of the alleged crime on her person.

It is a rule that the declarations of the prosecutrix in case of rape, made immediately after the commission of the crime, may be given in evidence to corroborate her testimony on the trial, and it may also be proved that she made complaint, but the particulars of the complaint made can not be admitted in evidence as to the truth of her statement. In Phillips on Evidence, vol. 1, p. 184, the rule is laid down, "The particulars stated by the prosecutrix as to the violence used, or the person who committed the violence, can not be received. The evidence should be confined to the bare proof of the fact that a complaint of personal violence was made, and that an individual was charged, without mentioning his name." Also the appearance of the person of the prosecutrix and her clothing may be shown, and that she promptly divulged the crime and made search for the offender. If the rape be charged to have been committed on an infant, her declarations of the circumstances can not now be proved further than that she made complaint. It was once held by Sir Matthew Hale, that though the infant had not sufficient understanding to be competent to testify as a witness, still she ought to be heard without oath, to give the court information.

But, says Sir William Blackstone (4 Com. 214): "It is now settled (Brazier's case, before the twelve judges), that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected." The rule that the declarations of one incompetent to testify can not be admitted in evidence, is now the established doctrine in the states of the Union, so far as we have been able to discover. In New York, in the case of *People v. McGee* (1 Denio, 24), the court says: "The rule is that when the person upon whom the offense is charged to have been committed, is incompetent

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by reason of infancy, idiocy, insanity, and the like, to be sworn and give evidence as a witness, no evidence of the assertions or declarations of such person, descriptive of the offense or of the offender, can be received in evidence; and that the declarations of the person upon whom the injury has been committed in relation to it, are only proper to be given in evidence to affect the credibility of the person, after having testified in the case.

The only remaining point in the case, is that there was error in the proceedings in the circuit court, in admitting the statements of Ruby Sumption to be made to the jury without her having been first sworn. The statement shows that she had some intelligence, and was capable of relating what she knew, and that she should have been sworn, and her statement then taken. Under our present practice, more liberality prevails in admitting witnesses than formerly, and all the tests, except unsoundness of mind and want of intelligence, are abolished, and the jury are allowed to receive the evidence and weigh it, and give to it such consideration as in their judgment it deserves. But no witness can testify without being first sworn, unless by the consent of parties, and we think it was error to receive her statement without her having first been sworn. (Code, 251, sec. 699.)

The judgment of the circuit court will be reversed, and a new trial ordered.

B. HAMBURGER, RESPONDENT, *v.* PETER AND BRIDGET GRANT, APPELLANTS.

FRAUDULENT CONVEYANCE—Where the amount of a creditor's claim was only three dollars and fifty cents: *Held*, that a court of equity would not interfere to set aside a conveyance, alleged to be fraudulent, at the suit of such creditor.

APPEAL from Clatsop County.

The appellants are husband and wife. The respondent alleges, that on the thirteenth day of July, 1878, he recovered judgment against the appellant, Peter Grant, for

Opinion of the Court—Kelly, C. J.

seventy-seven dollars and twenty-seven cents, upon which an execution was issued on the twenty-fifth of the same month, and returned unsatisfied except as to four dollars; that on July 10, 1877, Grant entered into a contract with one Armstrong, for the purchase of the property in question; that thereafter, on the eighteenth of July, 1877, and after the greater portion of the debt recovered upon had been contracted, the appellants, for the purpose of defrauding their creditors, and to prevent the respondent from collecting his claim, caused the property bargained for by Peter Grant, to be conveyed by Armstrong to Bridget, Peter's wife, without consideration. The appellants deny that the indebtedness in question was contracted prior to the conveyance complained of, or that there was any indebtedness by Peter Grant to Hamburger, at that time, or that the conveyance was fraudulent, and it is alleged that the property described was purchased by money which constituted a part of Bridget's separate estate.

The referee found that at the time the conveyance was made, Peter Grant was only indebted to Hamburger in the sum of three dollars and fifty cents. The court below found that the conveyance from Armstrong to Bridget Grant was made in contemplation of future, as well as of existing debts, and was fraudulent, and decreed that it be set aside.

J. Q. A. Bowlby, and O. F. Bell, for appellants.

J. W. Robb and C. W. Fulton, for respondent.

By the Court, KELLY, C. J.:

We think that the weight of testimony in this case shows that the contract made on the tenth of July, 1877, for the purchase of the house and leasehold interest was made with Armstrong by Bridget Grant and not by her husband Peter, the defendant; and that she paid for the property out of her own money, and on the eighteenth of July, 1877, took the conveyance from Armstrong in her own name.

The referee found that on that day Peter Grant was indebted to the plaintiff in the sum of three dollars and fifty

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cents. We think the evidence fails to establish the fact that the conveyance was taken in the name of Bridget Grant to defraud the plaintiff out of this small sum of money. Moreover, the interposition of a court of equity ought not to be asked to set aside a deed on the ground of fraud for such a small sum of money. For these reasons the decree of the court below will be reversed and the complaint dismissed.

Decree reversed.

**C. L. PARKER, RESPONDENT, v. MOSES ROGERS,
APPELLANT.**

TIDE LANDS—GRANTER OF RIPARIAN OWNER.—A person who has purchased tide land of a riparian proprietor has the exclusive right to a deed from the state to such tide land, if he makes his application to purchase in the time allowed by the statute.

DONATION LAW—BOND FOR DEED.—A bond for a deed to land, made prior to September 27, 1850, can be enforced against the obligee after he obtains a patent from the United States under the act of September 27, 1850.

WHARF RIGHTS—RESERVATION OF PRIVILEGES.—Where, in a conveyance of a lot bounded on tide water, the grantor reserves all privileges around said lot, it is a reservation of the right of wharfing.

THIS is a suit brought to have the appellant, Moses Rogers, decreed to be a trustee for the respondent, Parker, of whatever title he acquired under and by virtue of a deed executed by the board of tide land commissioners to said Rogers, lot 3, in block 8, in McClure's addition to the city of Astoria. The facts are as follows:

One John McClure, prior to the twentieth day of April, A. D. 1850, was a white male citizen of the United States, a resident of Oregon, and a married man, and was a settler and residing upon, and cultivating, that part of the public domain in Oregon afterwards known as McClure's Donation Claim, upon which a portion of the town of Astoria now stands, and which claim embraced so much of lot six in block eight as lies above ordinary high-water mark of the Columbia river. After the passage of the act of congress of September 27, 1850, commonly known as the donation law, John McClure notified upon and continued his residence upon and cultivation of said donation claim, and in

8	183
9	505
10	269
10	508
10	509
12	359
22	419
22	421
7*	344
30*	157
30*	158

8	183
25	162
35*	261
8	183
27	109

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all respects complied with the conditions and provisions of said act, so as to become entitled to said donation and to a patent; and on or about the twenty-seventh day of March A. D. 1866, a patent was duly issued to said McClure and Louisa, his wife.

Prior to the twentieth day of April, 1850, McClure had laid off a portion of said donation land claim as a town site into lots and blocks—the blocks numbered from one to eight and over—and made a map thereof. Block eight on said map, as laid out, was situated partly below and partly above ordinary high-water mark of the Columbia river—that is to say, ordinary high-water mark of the river crosses lot 6 in block 8, several feet south of the north end of said lot; and ordinary low-water mark crosses lot 3 in block 8 several feet north of the south line of lot 3—lot 3 lies immediately north of and adjoining said lot 6. On the twentieth of April, 1850, McClure delivered to one W. S. Keene his obligation under seal, and reciting that he had sold lot 6 in block 8, “being fifty feet front by one hundred in depth only, and bounded on one side by the Columbia river,” and obligating himself and his heirs to make to Keene a deed in fee simple to the lot, “bounded as above described,” “with a full reservation of all and every privilege around said lot.”

About the fourth of February, 1858, McClure and wife conveyed all their interest in the donation claim to Cyrus Olney, including so much of block eight as was situated within the boundaries of the claim, and all the riparian rights appurtenant thereto. Olney took with notice of Keene’s purchase. Thereafter, and on the nineteenth of September, 1865, Olney conveyed to the appellant said lot six in block eight. The deed contained a reservation in the following words: “Exclusive of any wharfing privileges.” The appellant had already succeeded to the rights of Keene in said lot six, and was in possession of so much of it as lies above ordinary high water. Thereafter, and for a valuable consideration, Olney conveyed to the respondent, Parker, lot three in block eight.

The appellant, Rogers, on the third day of August, 1876,

Argument for Appellant.

procured from the board of commissioners for the sale of state lands, a deed from the state for the tide lands in front of lot number six, which covers, and under which he claims lot number three. Prior to the application by Rogers to purchase from the state board, Parker, the respondent, had erected a wharf and building.

Wm. Strong & Sons, for appellant:

The land, as described in the bond of McClure to Keene of the twentieth day of April, 1850, is bounded on one side by the Columbia river. To be sure, it says that is one hundred feet only in depth, but by the well-established rule of construction, if the one hundred feet line does not reach the Columbia river, it must be extended until it does; distances must yield to natural objects. There is this reservation in the deed, viz.: "With a full reservation of every privilege around said lot." This, we contend, is not sufficiently certain in description to reserve anything. The property reserved must be described with the same accuracy as in a deed. (3 Washb. on Real Prop. 377.)

If the reservation was good, it is to McClure alone, the word assign nowhere being used. "A reservation being equal to a grant, there must be proper words of limitation and inheritance if the grantor intends to secure it to himself and his heirs, or to extend the enjoyment beyond his own life." (3 Washb. on Real Prop. 377, sec. 67; 9 Johns. 73.)

It is admitted that Rogers has succeeded to all the rights of Keene, under the bond of April 20, 1850. It is said that Rogers took a deed from Olney, September 19, 1865, containing this clause: "Exclusive of any wharfing privileges." If this is anything, it is an exception out of a grant; something which did not belong to the party who made the grant; the wharfing rights were all outside of the donation land claim of McClure. And it is neither a principle of law nor equity, that where a party takes a quitclaim deed for a portion of a tract of land he claims, he is thereby estopped from claiming the remainder of the tract.

Our title to the property in controversy rests upon the

Argument for Appellant.

state deed, which stands unimpeached by the testimony. There was no mistake or inadvertence. The board intended to give the deed to Rogers, and that intention was carried out. There is not the slightest testimony going to show any fraud in act or design upon the part of Rogers in applying to purchase tide lands in front of and abutting upon land that he did own. There is nothing to justify any fraud or mistake of fact upon the state board. And it seems not altogether decorous in a state court of justice—in the supreme court of the state—that private litigants should be heard without proof, or sufficient foundation in fact to raise even a suspicion, to charge fraud upon state officials in the exercise of their quasi-judicial functions for the purpose of gaining advantage in a suit in which they alone are interested.

We also rest upon our title through the bond of McClure to Keene, and the law of this land which gives the tide land to him who owns the river bank upon which it fronts, unless some one else shall show that he is entitled to purchase under some provisions of law, and has purchased. Until he has purchased, what right has he except to present his proofs to the board and ask the proper courts for a mandamus to compel them to make a deed? The title or claim of Parker, the respondent, must come either from the deed made to him by Cyrus Olney on the eighteenth of November, 1870, or it must come through proceedings before the state board of commissioners for the sale of state lands.

Now as to the claim of title by the deed: To hold that McClure could convey this to Olney and Olney to Parker, and thus give him a good title to the same on the ground that McClure acquired such title under his donation patent, would be to hold that all patents of land that fronts on tide water embrace the tide lands in front of them, and that the state is not the owner of such tide lands. Did he acquire any rights under the state tide land laws? The land claimed by the respondent is tide land, and there is other tide land between it and the bank above high water. The statute provides that the owner of land abutting or fronting on the river has the absolute right to purchase all the tide land in

Argument for Respondent.

front of the land so owned, subject to the following proviso. Provided, that if valuable improvements have been made upon any of the tide lands of this state before the title to the land on the shore shall have passed from the United States, the owner of such improvements shall have the exclusive right to purchase the lands so improved, extending to low-water mark, for the period of three years from the approval of the act to which this is amendatory. (Act approved October, 1874. The act to which it was amendatory was approved October 28, 1872.)

Parker is clearly not entitled to claim the patent from the state, because he does not own the bank upon which it fronts. He is clearly not entitled under the proviso; for, as has been before shown, the title passed from the United States on the twenty-seventh day of March, 1866, and Parker made no improvements, valuable or otherwise, and none were made on said land by any one else prior to the time when Parker bought this property of Olney, November 18, 1870.

Dolph, Bronaugh, Dolph & Simon, for respondent:

A grant of land adjacent to a navigable stream extends only to meander lines of ordinary high water. (*Hinman v. Warren*, 6 Or. 408; *R. R. Co. v. Schurmeir*, 7 Wall. 272; *Kraust v. Crawford*, 18 Iowa, 549.) The owner of the shore, by virtue of such ownership, has a right to construct wharves, bridges, piers, and landing places below low-water mark, if he conforms to the regulations of the state, and does not obstruct the paramount right of navigation. (*Dalton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Lockwood v. N. Y. & New Haven Railroad Co.*, 37 Conn. 387; *Yates v. Milwaukee*, 10 Wall. 497; *Grant v. Davenport*, 18 Iowa, 179; *Angel on Tide Waters*, 171, 234; *Bowman's Devisees v. Watham*, 2 McLean, 376; *Austin v. Carter*, 1 Mass. 231.) This right may be transferred without the shore, or may be reserved upon sale of the shore. (*Goodsell v. Lawson*, 42 Md. 348; *Elizabeth Phillips v. Jacob Rhodes*, 7 Met. 322; *Emuns v. Turnbull*, 2 Johns. 322; *Welch et al. v. Taylor et al.*, ante.)

Tide lands belong to the state by virtue of its sovereignty,

Opinion of the Court—Boise, J.

and do not pass by United States patent. (*Hinman v. Warren*, 6 Or. 408; *Welch et al. v. Taylor et al.*, *ante*.) Prior to the conveyance from Cyrus Olney to the appellant, April 19, 1865, Olney had a right under the act of October 17, 1862, to wharf out in front of lot 6, and this right he reserved. (General Laws, 787.) Application to purchase tide lands confers a right to be lost only by the fault of the applicant. (43 Cal. 56.) Parker was entitled to purchase under the amendatory act of 1864, and Rogers was not entitled to purchase under either act. (General Laws of Oregon, sec. 69, p. 644; Laws of 1874, 76.) A party obtaining a grant or patent from the state to lands which equitably belong to another, will hold the legal title in trust for that other. (33 Cal. 262, 263; 20 Ark. 664; 38 Cal. 90; 30 Cal. 306, and cases cited; 6 Or. 26.)

By the Court, BOISE, J.:

From the admitted facts, Rogers, before he received the deed from Olney, was the owner in equity of lot 6 in block 8 in the city of Astoria under the bond executed by McClure to Keene, for it has been uniformly held that a contract for the sale of a donation claim by one in possession under the provisional government of Oregon made prior to September 27, 1850, the date of the donation law, so called, can be inferred against the obligee, who afterwards obtains a patent under such act, or his assignees, who buy with notice. (*Lamb v. Davenport*, 1 Sawyer, 609.) The words in said bond, "with a full reservation of all and every privilege around said lot," were undoubtedly intended to operate as a reservation of the right to build a wharf. The language being general and reserving, all privileges would include everything appurtenant to said lot, and is more comprehensive than the reservation in the deed by Olney to Rogers, when wharfing privileges alone are reserved to the grantor; so that the deed from Olney to Rogers granted to him all the interest in the lots which he was equitably entitled to under the bond from McClure to Keene. Such being the situation of the parties, Olney and Rogers, in reference to the title to lot 6, we will now consider what rights were con-

Opinion of the Court—Boise, J.

ferred on them, or on either of them, by the law of 1862, granting the right of building wharves to persons owning lands on tide waters. Section 1 of that act provides, "that the owner of any land in this state, lying upon any navigable stream or other like water within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark, so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other water."

At the time this law was enacted, Astoria was an incorporated town, and as the evidence shows, had been laid out into blocks and lots, and some of these lots were situated entirely below high-water mark; such lots as were below high-water and above low-water were the property of the state, and no law had then been enacted providing for the sale of tide lands. When, therefore, a franchise was granted to the owner of any land lying on tide water to construct a wharf on his said land and extend it beyond the line of low water, such franchise necessarily included the right to build the wharf over the land between high and low water. Why the statute makes no mention of the tide lands over which the wharf must necessarily be extended is not now apparent, and it may be that it was then thought that these lands were private property and the subject of sale, as they were then claimed as such property, being sold like the lands above high water. The legislature seems to have assumed that these tide lands were the subjects of sale by the owner of the adjacent land above high water in the act of 1874, where it is provided that the purchaser of any tide land from the owner of the land adjacent to such tide land shall have the right to purchase the same from the state. By this act the legislature recognizes the rights of purchasers from adjacent owners. It is a clear rule that any franchise which is the subject of sale may also be the subject of reservation.

We are aware that it is a general rule that what is appur-

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tenant to land, passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water, is a franchise which attaches to the tide land, and it is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it. The legislature has established the right of the adjacent owners to sell the right of wharfing on the adjoining tide lands, by recognizing such sales and giving the owners thereof the preference to purchase.

There is no other construction that will harmonize these statutes and carry out the evident intention of the legislature to secure these lands to those who have purchased them from the owners of the adjacent lands and made improvements on them. It seems to have been the uniform purpose of the legislature to protect those who had purchased these lands from riparian proprietors or who in good faith had made valuable improvements on them. For the act of 1872 (General Laws, 644) provides for the protection of those who had made such improvement on the tide lands prior to the issuance of a patent to the adjacent lands. This act being deemed insufficient, the act of 1874 was passed, which has extended the provisions of the act of 1872, and provides for protection of those who have purchased tide lands from the proprietor of the adjacent land. Though the state was under no legal obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands, still the legislature, considering the fact that these lands had been dealt with as private property and improved sometimes by the erection of expensive structures which were a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids to commerce.

We think the admitted facts in this case show that Parker was a purchaser of the former adjacent proprietor, who had reserved the right of wharfing, and that that right, under the laws of the state, did not belong to Rogers. At the time the application for purchase of the land in controversy was

Argument for Appellant.

made to the state board, Parker had the exclusive right to purchase the land from the state, and the deed from the state should have been given to him and not to Rogers.

The decree of the circuit court will be affirmed.

JOHN McCULLOUGH, APPELLANT, v. M. S. HELLMAN AND W. H. CLARK, RESPONDENTS.

SURETY, NOT DISCHARGED BY JUDGMENT AGAINST PRINCIPAL.—The recovery of a judgment against a principal debtor on a note given by him, is no bar to an action against him and another on a note given as collateral security for the debt of the principal unless such judgment has been satisfied.

APPEAL from Grant County. The facts are stated in the opinion.

Shattuck & Killen, for appellant:

In the absence of any express agreement on the subject, the holder of a claim as collateral security may sue on it and hold the money when collected in place of the collateral instrument. (*Nelson v. Edwards*, 40 Barb. 279; *Jones v. Hawkins*, 17 Ind. 550; *Dix v. Tally*, 14 La. An. 456.) A collateral security is not extinguished by a recovery of judgment for the principal debt. (*Bank of Chenango v. Hyde*, 4 Cowen, 567.) Though the note representing the principal debt may be merged into a judgment thereon, yet the collateral securities therefor, whether upon real or personal property, should be allowed to stand; such securities are to be canceled only by a satisfaction of the principal debt, or by voluntary surrender. (*Butler v. Miller*, 1 N. Y. 500; 13 Johns. 240.)

A creditor who holds bonds as collateral security does not lose his right to hold the bonds by suing the principal and imprisoning him on getting judgment. (*Smith v. Strout*, 63 Me. 205; Brandt on Suretyship, 214.) Judgment against the principal is no bar to suit against the surety. (Brandt on Suretyship, 340; *White v. Smith*, 33 Pa. St. 186; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147.) A note

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pledged as collateral security for a debt due the plaintiff from the pledgor continues valid and effectual until the principal debt is paid, notwithstanding the evidence of such principal debt has been changed from a promissory note to a judgment. (*Fisher v. Fisher*, 98 Mass. 303.)

There was no appearance for the respondent.

By the Court, KELLY, C. J.:

The complaint states in substance that on the eighth day of September, 1876, the respondent, M. S. Hellman, executed and delivered his promissory note to the appellant, John McCullough, for the sum of two thousand and five hundred dollars, payable six months after date; that at the same time Hellman delivered to appellant two warrants drawn by the state treasurer in favor of S. C. Hillis, amounting to one thousand eight hundred and twenty-five dollars, and payable to him or order. These warrants were delivered to the appellant to be held by him as collateral security for the payment of the two thousand and five hundred dollar note, and they were so held by him until the twentieth day of July, 1877. On that day, in consideration that the appellant should deliver the warrants to them, the respondents agreed to execute and did execute and deliver to the appellant their joint and several promissory note payable to him or order one day after date for one thousand dollars. This note was delivered by respondents to the appellant in lieu of the two warrants, and held by him as collateral security for the payment of Hellman's note for two thousand and five hundred dollars.

An action was commenced on this latter note and a judgment obtained thereon on the eighteenth day of September, 1878, for two thousand two hundred and nine dollars and ninety cents against Hellman, and on this judgment there is still due the sum of one thousand nine hundred and seventy-six dollars and twenty-eight cents. The appellant, although he has used all diligence to collect the same, has been unable to do so, and said Hellman has no property liable to execution. The appellant (plaintiff below) then alleges in his complaint that he is the owner and holder of

Points decided.

the note for one thousand dollars, made and delivered to him by the respondents (defendants below) on the thirtieth day of July, 1877, that the whole amount and interest thereon is due to him from the respondents and he demands a judgment for that sum.

The respondents demurred to the complaint, and assigned as grounds of demurrer that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and rendered a judgment for the respondents. In this we hold there was error.

This action was brought upon the one thousand dollar note which was given as collateral security for the payment of the two thousand five hundred dollar note of Hellman, and it is not a legal defense to show that appellant brought an action and recovered a judgment upon the two thousand five hundred dollar note, and that, therefore, the whole indebtedness of respondents was merged in that judgment. The recovery of a judgment upon a simple contract debt without satisfaction thereof will not discharge a note pledged as collateral security for the debt. (*Fisher v. Fisher*, 98 Mass. 303.) The recovery of a judgment against a principal is no bar to an action against him and another on a contract of guaranty executed by both of them jointly. (*White v. Smith*, 33 Penn. St. 186; *Brandt on Suretyship*, 340.)

The judgment of the court below is reversed and this cause remanded for further proceedings.

MONTGOMERY WINKLE, APPELLANT, v. LUCINDA WINKLE, RESPONDENT.

ADMINISTRATION—JURISDICTION OF COUNTY COURT—DISTRIBUTION OF PERSONAL PROPERTY.—The county court has exclusive jurisdiction over the distribution of the personal property of deceased persons, and if there be an antenuptial contract which affects such property it should be proved before such court and the rights of the parties thereunder determined by such county court.

IDEM—ORDERS FINAL, WHEN.—If parties interested in the estate do not appeal from orders of the county court duly made, such orders become final and can not be inquired into in a court of equity.

8	193
90	314
25*	717
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8	193
90	501
439	246
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8	193
641	500
47	64
	—
8	193
48	616

Statement of Facts.

THIS is a suit to establish a trust. It is alleged in the complaint that on the sixth of June, 1873, one Isaac Winkle and the respondent, in contemplation of marriage, entered into an agreement as follows: "That for and in consideration of marriage between Isaac W. Winkle, of Benton county, Oregon, and Lucinda Bryan, of Lane county, Oregon, the said Lucinda Bryan hereby covenants and agrees to and with the said Isaac W. Winkle and his heirs at law, to release and abandon all claim of dower in and to all the real estate of the said Isaac W. Winkle, to which she would be entitled in the law by reason of said marriage, and waives all right, both at law and equity, to any dower in said real estate of said Isaac W. Winkle, and transfers all her right of dower which she may obtain by reason of said marriage, to said heirs. And the said Isaac W. Winkle hereby agrees to and with the said Lucinda Bryan that she shall have, possess, and enjoy of his property an equal share with his heirs; that at his death his real and personal estate shall be sold and converted into money, and that the proceeds thereof shall be divided equally between said Lucinda Bryan and any other heirs. This instrument to be void in case said marriage is not consummated."

That said Isaac Winkle and the respondent afterwards intermarried; that after said marriage, said Isaac Winkle died possessed of the property described in the complaint; that after his death, and about the month of September, 1876, administration of his estate was duly granted to one John S. Baker, who duly qualified and proceeded to discharge the duties of his trust; that the respondent applied to the county court and had set apart to her, under section 1095 of the code, all of the property in dispute in this case, except two beds and bedding; that the appellant, and some other children of the deceased, were about to take steps to have the legality of said order tested, but the respondent gave assurances that she did not desire said allowance, and then the appellant gave up the idea of appealing from said order; that the respondent had also obtained possession of two beds and bedding, of the value of one hundred dollars, since the death of said Isaac Winkle, which belonged to

Opinion of the Court—Boise, J.

said estate, and that she wrongfully and fraudulently refuses to allow the same to be distributed among said heirs; that said administration has been duly closed and said administrator discharged, and that the appellant had purchased the interest of the other heirs of said property.

The circuit court, on the motion of respondent, struck out of the complaint all the allegations of ownership or claim to the property set apart to her under section 1095 of the code.

The respondent answered, denying the execution of the agreement referred to; that a distribution of any property had been made under the terms of such agreement; that she obtained possession of the beds and bedding as alleged in the complaint, and she alleges that such bedding is exempt from execution and was so during the administration of the estate; that the administrator failed to include such property in his inventory; that it has never been administered upon; that the estate has been settled and the administrator discharged; that Isaac Winkle was a resident and householder in Benton county, and that the property was kept by him for the use of the family; that the respondent is his widow and is entitled to it.

Upon the issues presented and the evidence taken, the court rendered a decree in favor of the respondent, dismissing the appellant's bill. From that decree this appeal is taken.

F. A. Chenoweth, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

A number of questions have been discussed in this case, and among them the jurisdiction of a court of equity to declare and enforce a trust in a case like this. It is claimed by the respondent that the appellant can only obtain a title to the property in dispute by an order of the probate or county court. We think that this position is correct, for it is a fundamental principle of the common law of this country that the personal property of deceased persons goes by

Points decided.

operation of law to the administrator when the deceased leaves no will. Under our statute he must distribute it or the proceeds of it under the orders of the county court. (Statutes of Oregon, p. 328, sec. 1109; p. 548, sec. 2.)

The title to the personal property of a deceased person must be derived from the administrator through the orders of the court, and the orders of said court and the distribution made under them of personal property, are binding on all persons who are interested in the estate, provided such orders are regular and in due form of law. The antenuptial contract set out in this case should have been proven in the probate court, and the rights of the parties affected by it there determined, and if the parties were not satisfied with the proceedings there had, then either could have appealed to the circuit court. If they neglected to appeal, the decree of the probate court became final, and is not subject to be reviewed in a court of equity. It is claimed that the two beds named in the complaint were not disposed of by the administrator. If these beds or any other property were not administered on by the administrator, and the administration was closed and the administrator discharged from his trust, then the appellant, if he claims an interest in it by virtue of being an heir, must apply to the county court to have an administrator *de bonis non* appointed to administer upon it. For the statute has conferred on the county court exclusive jurisdiction in all matters pertaining to the transfer of the title to personal property of deceased persons. A court of equity has no jurisdiction over it.

The circuit court had no jurisdiction to grant the relief prayed for, and the bill should be dismissed.

This view of the case renders it unnecessary to consider the other questions argued in the case.

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MARGARET A. MCCOY, APPELLANT, v. JAMES R. BAYLEY, RESPONDENT.

MISTAKE IN DEED MUST BE MUTUAL.—A mistake in a deed or written instrument will not be corrected and reformed, unless the mistake is shown to be mutual and clearly proven by satisfactory evidence.

Opinion of the Court—Prim, J.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth, for appellant.

John Burnett and John Kelsay, for respondent.

By the Court, PRIM, J.:

This is a suit in equity, the complaint being in the nature of a cross bill, and having for its object the correction of an alleged mistake in a deed and for the purpose of obtaining a perpetual injunction against the respondent from prosecuting an action at law for damages based upon said deed.

The amended complaint alleges in substance that on the twenty-third day of May, 1870, John H. Kendall, now deceased, and Fanny, his wife, executed and delivered to the defendant, James R. Bayley, a deed to lot one, in block eleven, in the city of Corvallis, Benton county, Oregon (a copy of which is annexed to the complaint), and that by mistake, the deed above mentioned used the word "lot," when it was intended to use the words "south half of lot one, in block eleven, in the city of Corvallis, Benton county, Oregon." The answer admits the execution of the deed mentioned in the complaint; admits that the copy annexed to the complaint is a correct copy of the deed executed by Kendall and wife to him on the twenty-third day of May, 1870, but denies that there was any mistake in the deed whatever, and alleges that at the time mentioned in the complaint he purchased of said Kendall lot number one, in block number eleven, in the city of Corvallis, Benton county, Oregon, and paid therefor the sum of fourteen hundred dollars, and received the deed mentioned and set out in the complaint. This allegation is denied in the reply.

The only question presented in this case by the pleadings is one of fact, whether or not there was a mistake in the deed from Randall and wife to Bayley, executed on May 23, 1870. The allegations of the complaint being denied by the answer, it devolves upon the appellant to prove the mistake. It has already been decided by this court in

Points decided.

several cases that in order to reform a written instrument, the mistake must be material, and plainly and clearly made out by satisfactory proofs. (*Everts v. Steiger*, 5 Or. 151; *Stephens v. Murton*, 6 Id. 193; *Remillard v. Prescott*, decided at this term of court.)

After a careful examination of the evidence in this case, we find that it fails to show any mistake in the deed mentioned in the complaint. We are, therefore, of opinion that the decree of the court below dismissing the bill with costs should be affirmed.

**MOLLIE LAHEY, RESPONDENT, v. JOSEPH KNOTT,
APPELLANT.**

COMPLAINT—CAUSE OF ACTION—DAMAGES FOR BREACH OF MARRIAGE CONTRACT.—Where it is averred in the complaint that the respondent, at the request of the appellant, promised to marry him at such time as she should come from Washington city to Portland, Oregon, at his request, and that she did so come about the fifteenth day of April, 1878, and on that day the appellant again promised to marry her about the twentieth of May, 1878, but instead thereof, on the third day of June, 1878, married a Mrs. Harvey, although he had notice all of said time that respondent was ready and willing to comply with her said agreement: *Held*, that the complaint alleged facts sufficient to constitute a cause of action.

INSTRUCTIONS MUST APPEAR TO HAVE BEEN PERTINENT.—The refusal of the circuit court to allow certain questions propounded to a witness to be answered will not be held error, unless it can be ascertained from the bill of exceptions, and other portions of the record, that they were pertinent and relevant.

MARRIAGE CONTRACT—REQUEST TO MARRY.—If appellant agreed with and offered to marry respondent in Washington, and afterwards, by mutual consent, it was arranged between them that she come to Oregon, at which place the marriage should be consummated, and with that understanding respondent did come to Oregon, and was then ready and willing to marry him, married a third person, then the respondent was entitled to recover without first showing any request to offer to marry appellant.

APPEAL from Multnomah County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Simon, for appellant.

Caples & Mulkey and O. P. Mason, for respondent.

Opinion of the Court—Prim, J.

By the Court, PRIM, J.:

This is an action to recover damages for an alleged breach of promise of marriage.

For cause of action it is alleged: "That on or about the first day of December, 1877, in consideration that the plaintiff, who was then sole and unmarried, at the request of the defendant, had then promised the said defendant to marry him; the said defendant, at said Washington city, promised to marry the said plaintiff at such time as she, the plaintiff, at defendant's request, should come from Washington city to the city of Portland, in Oregon. That in pursuance of such agreement to marry, the said plaintiff did, on or about the fifteenth of April, 1878, at the request of the defendant, come from said Washington city to Portland, Oregon, and that said defendant, at said last-named city, on or about the day last named, again promised and agreed to marry said plaintiff, on the twentieth day of May, 1878; and plaintiff avers that she, confiding in the promises of the said defendant, hath always from thence hitherto remained, and still is sole and unmarried, and has been for and during all the time aforesaid, to wit, since the fifteenth day of April, 1878, until the marriage of the defendant hereinafter named, ready and willing to marry the said defendant, whereof the said defendant has always had notice; yet that the said defendant, not regarding his said promise, did, after the making of said promise, on or about the third day of June, 1878, wrongfully marry one Mrs. Harvey (whose name is not more fully known to plaintiff), contrary to his said promise, whereby the plaintiff, as she avers, has sustained and is damaged in the sum of twenty-five thousand dollars."

Each material allegation of the complaint is denied in the answer, except the intermarriage of the appellant with Mrs. Harvey. A verdict and judgment was obtained against the appellant in the sum of two thousand dollars, from which an appeal has been taken to this court.

The first ground of error relied upon is that the complaint does not state facts sufficient to constitute a cause of action. It will be seen that it is averred in the complaint

Opinion of the Court—Prim, J.

that the respondent, at the request of the appellant, promised to marry him at such time as she should come from Washington city to Portland, Oregon; that she did come to Oregon, at the request of appellant, about the fifteenth day of April, 1878, and that on that day the appellant again promised to marry the respondent about the twentieth of May, 1878, but instead thereof, intermarried with Mrs. Harvey about the third day of June, 1878. That respondent was willing and ready all of said times to comply with her said agreement, of which the said appellant had notice. The complaint in our opinion does contain facts sufficient to constitute a cause of action, and this ground of error should be overruled.

The next ground of error relied upon is that the court erred in refusing to permit a witness for the appellant to answer certain questions propounded to him by the appellant. It appears from the bill of exceptions that the respondent was introduced as a witness on her own behalf, and swore that during the winter of 1877-78, at Washington city, she and appellant entered into a contract of marriage; that the appellant desired to consummate the marriage then and there, but that she declined on the ground of undue haste, and other grounds there specified; that the appellant then returned to Oregon upon the understanding that the respondent should soon thereafter be furnished with money by the appellant to defray her expenses to Oregon, and that upon her arrival here such marriage should be consummated.

After the evidence of the respondent was closed, Hon. Richard Williams, member of congress for Oregon, was called as a witness by the appellant, and testified: "That during last winter, and while the appellant was in Washington city, the respondent, in company with one Charles Newell, had an interview with him (the witness), in which she stated that she was very poor and out of employment, and could get nothing to do there to earn a support, and wished to come to Oregon to seek employment, and was desirous of having the appellant aid her by furnishing her the money to defray the expenses of the trip to Oregon, and

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requested the witness to see appellant and use his influence with him to induce him to assist her by furnishing her with money to come to Oregon; that witness did have an interview with appellant as requested, and told him what the respondent had requested of him, as stated above." Witness also testified that after the appellant had returned to Oregon the respondent and Crandall came to him with a letter from appellant, and that witness in conversation with her at that time said to her: "If you are going to Oregon to get employment you had better go on an emigrant train, for you will save a month's wages every day of the trip; but if you are going out there to marry old man Knott, you had better go first class."

This witness was then asked the following questions: "State what the appellant said to you in reply to what you thus communicated to him?" "State what you said to the appellant and what he said to you in reply, when you communicated to him this conversation and request of the respondent as you have testified?" The same questions were put to the appellant while he was upon the stand testifying in his own behalf. These questions were not allowed to be answered, upon the ground that the respondent was not shown to be present, and that the testimony sought to be elicited was irrelevant.

If these communications occurred prior to the alleged engagement of marriage between the appellant and respondent, the replies of the appellant thereto were irrelevant and not admissible; but on the other hand, if it had been made to appear that they occurred subsequent to said engagement, they would have been relevant and should have been admitted. The bill of exceptions failing to disclose when this occurred, whether before or after the engagement, we must presume that it occurred prior to said engagement. Error is never presumed, but must be made to appear.

It is further claimed that the court erred in giving to the jury certain instructions asked by counsel for respondent, which were as follows:

1. "If you find from the evidence that the contract of marriage was entered into between plaintiff and defendant,

Opinion of the Court—Prim, J.

and that before the commencement of the action defendant married another person, and by so doing placed himself in such a condition that he could not comply with his contract, then no offer on the part of plaintiff was necessary."

2. "If the jury believe that there was a contract made and entered into between these parties, and that defendant has broken off that contract, and refused to comply with it, then the plaintiff is entitled, as a matter of course, to damages, as a necessary consequence following from the breach of the same."

3. "If the jury believe that there was a contract to marry plaintiff in Washington, and that the defendant offered to marry plaintiff there, and that afterward, by mutual consent, they concluded that she should come to Oregon, and that the marriage should then be consummated; and that, with that understanding, the plaintiff did come to Oregon, and was ready and willing, or offered to marry defendant; and if defendant, while plaintiff was so ready and willing, did some act which incapacitated him from marrying plaintiff, or which had the effect to dispense with an offer by plaintiff, then the plaintiff is entitled to recover without first showing such offer or request by her to defendant."

We think there was no error in either of these instructions. (42 N. Y. 246.)

Counsel for the appellant asked the following instruction: "If the jury believed from the evidence that an agreement or contract for marriage was entered into between plaintiff and defendant, and that defendant afterward, several times, offered and proposed to marry plaintiff, and such offer was declined on her part without reasonable ground for so doing, then the jury should find for the defendant."

Which instruction the court gave, and added thereto the further instruction: "But if you find that such offer was at any time made, and was so declined, not because plaintiff objected generally to marrying defendant, but because she objected to so doing at that particular time, and you find that such objection was reasonable, or was acquiesced in by the defendant, then the fact of such refusal should not be

Opinion of the Court—Prim, J.

treated so as to discharge defendant from his obligation to marry plaintiff, if he was under such obligation."

It is claimed on behalf of appellant that the additional instruction of the court qualifying the one asked by the appellant was erroneous and should not have been given. To this we can not assent, as we are of opinion it contains a clear statement of the law upon that proposition.

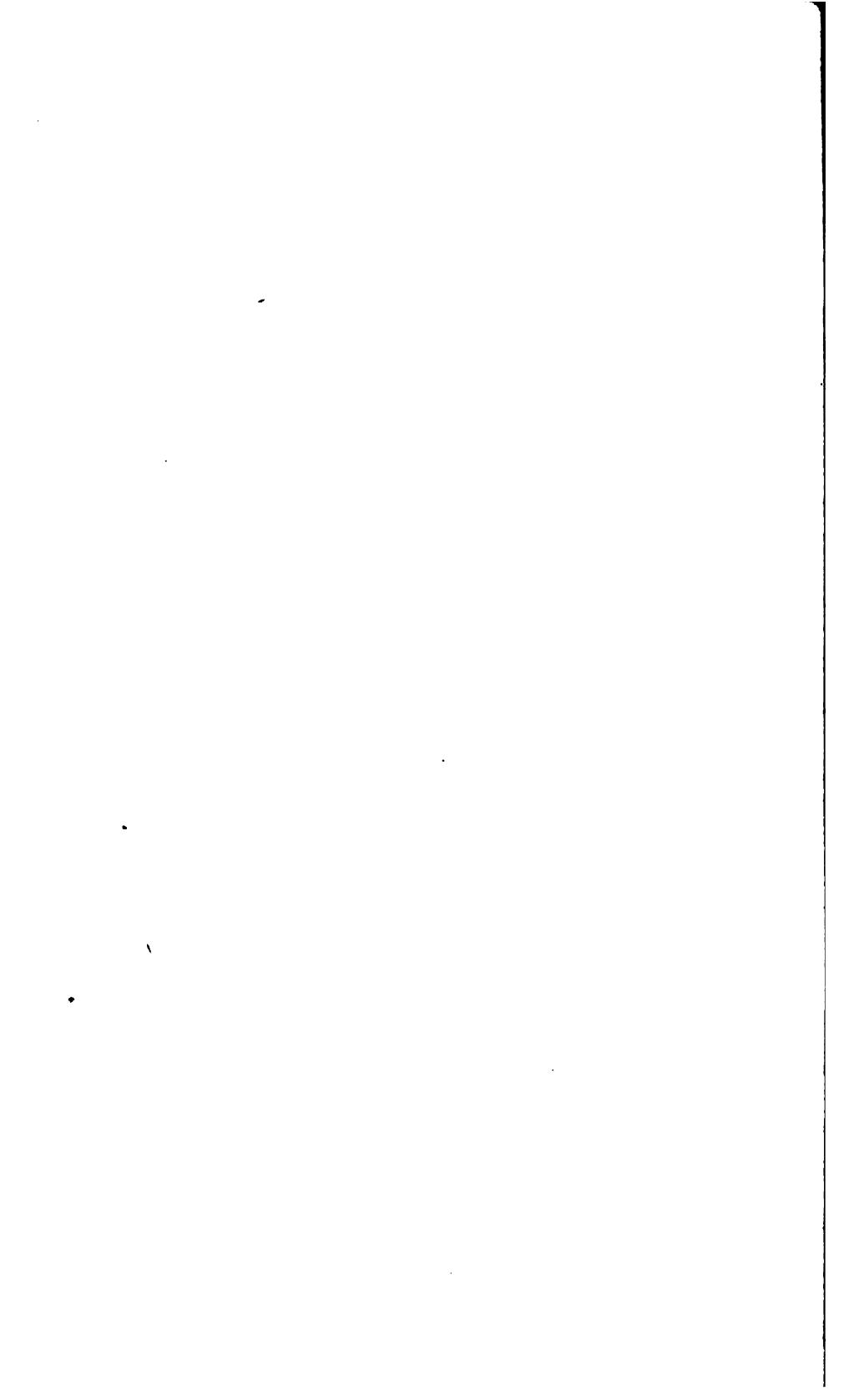
The appellant also asked the court to give the following instructions which were refused: "The plaintiff alleges in her complaint that defendant, at Washington City, promised to marry plaintiff, at such time as she, the plaintiff, at defendant's request, should come from Washington City to the city of Portland, Oregon. If, therefore, the jury believe from the evidence that after plaintiff arrived in Oregon, the defendant at a reasonable time offered to marry her, and she refused or declined to marry him, then plaintiff can not recover in this action."

"If the jury believe from the evidence that defendant offered to marry plaintiff in Washington City, and she declined on the ground of the marriage then being too hasty; and that afterward, at San Francisco, plaintiff offered to marry the defendant, and that she then again declined on the ground that she was unwilling to marry plaintiff until she reached Oregon and saw the house she was to occupy, and that the next day after reaching Oregon the plaintiff again declined to marry defendant on the ground that she was too tired then; and three weeks thereafter, defendant offered to marry plaintiff, and she declined on the ground that she was then sick, the jury should find for the defendant."

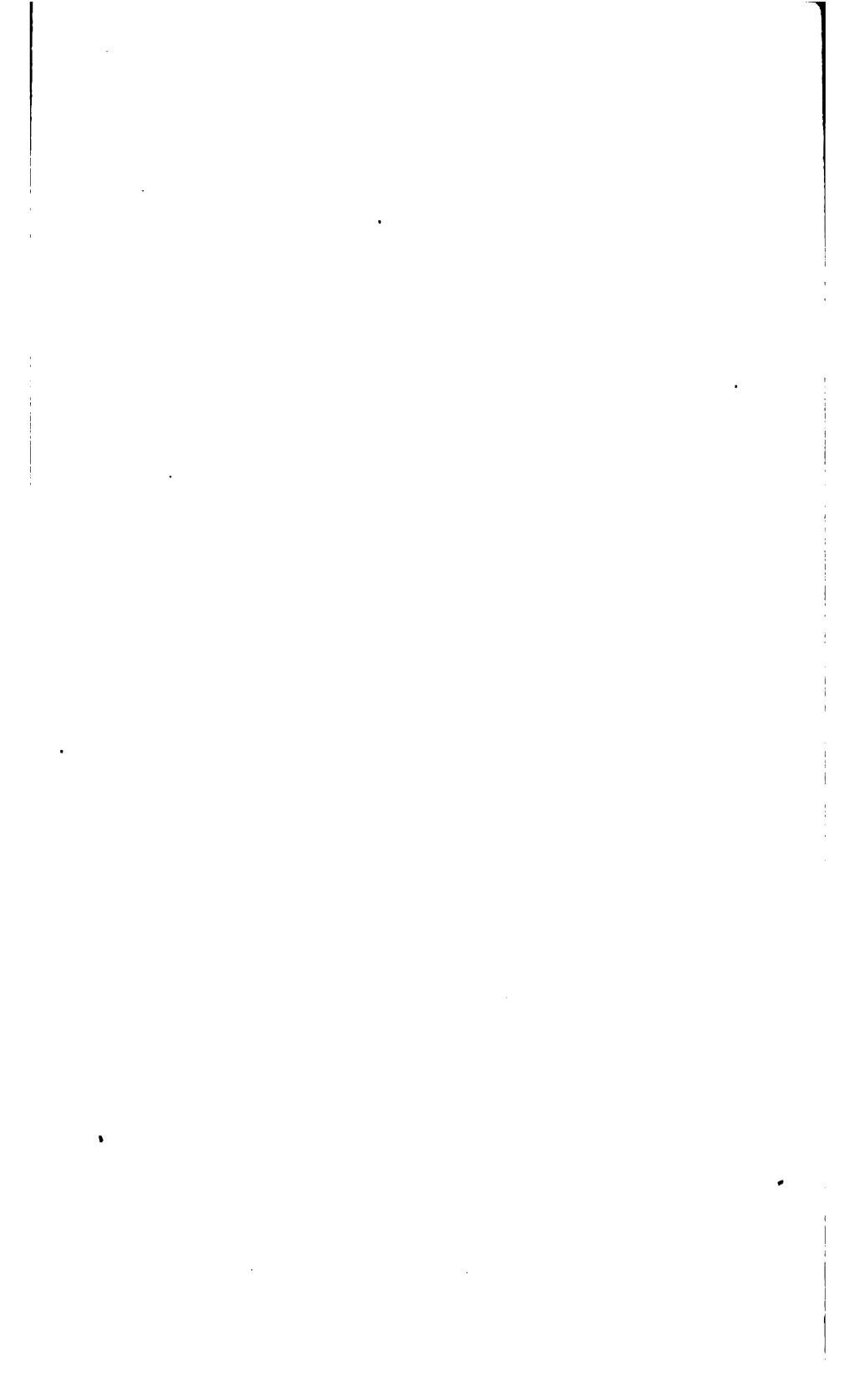
The refusal of these instructions is also assigned as error.

If these instructions were admissible under the pleadings, they are objectionable upon the ground that they withdraw entirely from the consideration of the jury the question as to whether the excuses of the respondent were reasonable and sufficient to exonerate her from a breach of contract.

There being no substantial error in the record, the judgment is affirmed.



JANUARY TERM, 1880.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JANUARY TERM, 1880.

THE STATE OF OREGON, EX REL. J. H. MAHONEY,
RESPONDENT, v. J. D. MCKINMORE ET AL., APPELLANT.

8	207
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034	571
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036	558

APPEAL—MOTION TO PERFECT, WHEN FILED.—A motion to perfect an appeal by filing a new undertaking must be filed before a motion to dismiss the appeal is brought on for hearing.

ITEM—AFFIDAVITS OF SURETIES, WHEN FILED.—Affidavits showing the qualifications of sureties to an undertaking must be filed contemporaneously with the undertaking.

ITEM—AMOUNT OF UNDERTAKING.—An undertaking on appeal must not be limited in amount.

APPEAL from Douglas County.

In this cause the respondent moves to dismiss the appeal: 1. For the reason that the undertaking is limited in amount to the sum of two hundred dollars. 2. Because no affidavits are filed, undertaking as to the qualifications of the sureties thereto. After this motion was called for argument and the counsel for respondent had opened the case, and while he was making his argument upon the motion, the counsel for appellants filed a cross-motion asking leave to file a new and sufficient undertaking.

By the Court, BOISE, J.:

In the case of *Cross v. Chichester*, 4 Or. 114, it was held by this court that it is too late to apply to the court to perfect the appeal by filing a new undertaking “after the motion to dismiss is brought on for hearing,” and such has been the rule of practice since that decision; and we think

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the rule laid down in that case is decisive of this point in this case, and that the appellant was too late in filing his motion to perfect the appeal by filing a new undertaking. In the case of *Holcomb v. Teal*, 4 Or. 352, it was held that the affidavits of the sureties in an undertaking on appeal as to their qualifications must be filed contemporaneously with the filing of the undertaking, and as there are no affidavits as to the qualifications of the sureties filed in this case, we must hold this undertaking insufficient unless we disregard the authority of that case, which we do not think we would be warranted in doing. It is also urged that this undertaking is not sufficient, for the reason that the obligation of the sureties is limited to the sum of two hundred dollars. The statute regulating appeals, page 219, sec. 528, provides that "the undertaking of the appellant shall be given with one or more sureties to the effect that the appellant will pay all damages, costs, and disbursements, which may be awarded against him on the appeal, but such undertaking does not stay proceedings unless the undertaking further provides to the effect following." * * * In order to perfect the appeal the appellant must comply with the statute, and give to the respondent all the security which the statute guarantees to him. It is not possible to ascertain before the appeal is tried the amount of the damages, costs, and disbursements that will be awarded to the respondent if the appeal is determined in his favor. If the appellant can limit the liability of his sureties to two hundred dollars, he may to any less sum. The law has limited the liability of the sureties to the damages, costs, and disbursements, and the respondent has a right to insist that the undertaking be not otherwise limited in amount. And it is a general rule that statutory bonds and undertakings, to be valid and binding as such, must in substance conform to the requirements of the statute. It is a statutory remedy that the appellant is seeking by his appeal, and in order to avail himself of it he must comply with the requirements of the statute.

We think that the undertaking is defective in binding the liability of the sureties.

The appeal will be dismissed.

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B. F. DRAKE, RESPONDENT, v. JAS. K. SEARS, APPELLANT.

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44	574

8	209
48	355

MEASURE OF DAMAGES—WARRANTY OF ENGINE.—In case of a breach of warranty in the sale of an engine to be used in elevating grain at a warehouse, the warrantee is entitled to recover of the warrantor such damages as naturally, according to the usual course of things, would result from the breach, and the necessary expense incurred by the warrantee in putting up said engine would be such natural damages. So, also, the expense incurred by the warrantee in handling and storing grain while trying to work the engine which proved a failure.

ITEM—PROFITS OF BUSINESS.—As a rule, the loss of the profits of a business which has been interrupted by a breach of warranty can not be claimed, unless the parties are shown to have contemplated, or can reasonably be presumed to have contemplated such loss at the time the contract was made.

APPEAL from Polk County. The facts are stated in the opinion.

B. Hayden, W. H. Holmes, and X. N. Steeves, for appellant.

Magers & Lawson and Daly & Gaby, for respondent.

By the Court, BOISE, J.:

This is an action to recover the price of an engine, boiler, and appurtenances, alleged by the respondent to have been by him sold and delivered to the appellant at the agreed price of seven hundred and fifty dollars; also to recover the sum of four hundred and fifty-three dollars and twenty-one cents for materials and machinery sold and delivered to the appellant by the respondent on a book account, both claims aggregating the sum of one thousand two hundred and three dollars and twenty-one cents.

The defendant, in his answer, denied the absolute sale of the engine, and denies that the materials and other machinery, contained in plaintiff's second cause of action, were worth more than the sum of three hundred and sixty-two dollars and eighty-eight cents, and alleges that the same were purchased by defendant at the agreed price of said three hundred and sixty-two dollars and eighty-eight cents between the plaintiff and defendant, and admits that they were worth that price; so that the only controversy as

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to these articles named in said count of the complaint is as to the price.

As to the engine named in the first count of the complaint, the defendant, after denying the sale and indebtedness therefor as alleged in the complaint, alleges, by way of a separate and further answer, that he purchased the same to be used in his warehouse at McCoy, in Polk County, in elevating and cleaning grain; that the plaintiff warranted the engine to be perfect, and capable of doing the work of elevating and cleaning the grain at his said warehouse in a complete and satisfactory manner, and that it was a good and capable engine for said purposes, and that the defendant was not to pay for the engine until it was proved to be capable; that the engine was received by the defendant at the earnest request of plaintiff, and on his express warranty that it was sufficient for said purposes; that the plaintiff selected a man, by the name of J. F. Leach, to set up the engine to give it a fair trial, for whose services the defendant was to pay three dollars and a half per day; that said J. F. Leach did set up said engine in said warehouse, but that it could not be made to do the work, and that the same proved worthless, and that the defendant notified the plaintiff of that fact, and that he would not accept said engine; that said Leach was employed on said engine, in putting up and trying to operate the same, eleven days, between the twentieth day of August, 1879, and the fifth day of September of the same year, and that defendant has paid said J. F. Leach eighteen dollars on said work.

Defendant claims that there has been a breach of said warranty by the plaintiff, and claims damages therefor in the following allegations in his answer:

“Defendant alleges that under the contract aforesaid the plaintiff was to deliver said machine on or before the sixteenth day of July, 1879, but the same was not delivered until some days later, to wit: about the twenty-first of August, 1879. Defendant alleges that by reason of the aforesaid representation and warranty of the plaintiff, the defendant paid for hire of teams and men, and for materials used in trying to operate said engine—amounting to two hundred

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and twenty-one dollars and fifty cents, to his damage in that amount. And defendant further alleges, that by reason of the worthlessness of said engine and the failure of the same to do the work as warranted, the defendant was unable to properly store and care for the grain received at his said warehouse, and was compelled, in consequence thereof, and the contracts of defendant with other parties, to receive and store large quantities thereof, to wit, about ten thousand bushels of wheat, out of doors, where the same was exposed to the storms, and the defendant was thereby compelled to expend large sums of money in handling and removing said wheat, to wit, one hundred dollars, and two hundred bushels was rendered unmarketable in consequence thereof, and the defendant was thereby damaged in the sum of one hundred dollars.

"And the defendant further alleges that, by reason of the failure of said engine to do the work as warranted, as aforesaid, the defendant was compelled to secure the services of another engine, at great trouble and expense, to his damage in the further sum of one hundred dollars. And the defendant further alleges that, by reason of the said worthless character of said engine, and the failure of the plaintiff to make the same work, as warranted, in driving the cleaning and elevating machinery of the defendant aforesaid, sundry and divers persons, with whom the defendant had entered into contract to receive and store their grain for the year 1879, at said warehouse of the defendant, and who had then sacks belonging to the defendant for the purpose of sacking such grain for the purpose of hauling the same to the warehouse of the defendant, refused to deliver their sacks of wheat to the defendant, and the defendant thereby lost all of such contracts. And, defendant further alleges, that in consequence of the failure of said engine to do the aforesaid work, as warranted aforesaid, the defendant was unavoidably prevented from putting large quantities of said wheat, so received by him at his said warehouse, in the bins of said warehouse, and was thereby compelled to, and did, purchase sacks to sack the same, to wit: Six thousand sacks to the further damage of the defendant in the sum of two hundred and forty dollars.

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"Defendant alleges that he did not and could not, with reasonable diligence and skill, ascertain the fact of the useless character of said engine until about the seventh day of September, 1879, when he immediately notified plaintiff, as hereinbefore stated. Defendant alleges that he is damaged, in consequence of the breach of the aforesaid warranty of plaintiff, in the aggregate over and above the lawful demands of the plaintiff of three hundred and sixty-two dollars and eighty-eight cents, in the full and just sum of seven hundred and fifty-five dollars and thirty-seven cents. Wherefore defendant demands judgment against plaintiff for the sum of seven hundred and fifty-five dollars and thirty-seven cents and costs and disbursements herein sustained and expended."

The plaintiff demurred to these several defenses, for the reason that they did not state facts sufficient to constitute a cause of action for a breach of the warranty.

If the plaintiff warranted the engine to have capacity to do the work of elevating and cleaning the grain at the defendant's warehouse, and by such warranty the defendant was, as he alleges, induced to take the same and set it up, and the engine proved a failure without the negligence or fault of the defendant, then there was a breach of the warranty, and the defendant would be entitled to recover for such breach such damages as naturally, according to the usual course of things, would result from such breach, which was the failure of the engine to do the work. The expense which the defendant incurred in employing men and teams to work, and furnishing materials to be used in putting up the engine, would, we think, be such natural damages, and such are the damages claimed in the first special answer, to which the demurrer was sustained. Such answer is not very full and specific, but no objection is made to it on that account, and we think the matter contained in it is pertinent and proper to be claimed for a breach of such warranty. So, also, the damage claimed as resulting from the failure of the engine to elevate grain, so that the defendant was unable to properly store or care for grain that came to his warehouse, and was compelled to leave ten thousand bushels out doors, where it was damaged by the elements,

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was, we think, the natural result of the failure of the engine to work, and such as the parties, when they made the contract of sale and warranty, might reasonably contemplate would result from such failure. (3 Pars. Con. 183, note.)

The next special answer or counter claim is simply an allegation that the defendant was, by reason of said failure, compelled to secure another engine. Whether he hired it or bought it, does not appear, or how he was damaged. We think there is no sufficient statement of a counter claim stated in this allegation.

The next separate counter claim is that defendant lost his customers who had taken sacks, and, as he alleges, would have stored wheat with him. He alleges that he lost business, but does not allege what profit he could have made on these contracts. He states what he was to have for storing and caring for the grain; but for all that appears the expense of storing, work, and losses attending it might be more than he was to receive. And we think, if such profits could be legitimately claimed, that no case is stated in this separate answer. As a rule, the loss of the profits of a business that has been interrupted by a breach of warranty can not be claimed unless the parties are shown to have contemplated, or can reasonably be presumed to have contemplated such loss at the time the contract was made, for the breach of which the action is brought. (3 Pars. 183; 5 Barb. 424; 4 Id. 261.) So we think the demurrer to this part of the answer was properly sustained.

So, too, the defendant in the next separate answer, where he alleges that he was compelled to purchase six thousand sacks, to his damage two hundred and forty dollars, does not show how the damage resulted, and the allegation is not sufficient to state a counter claim, and the demurrer to this allegation was properly sustained.

We think, for the reasons stated, that the court erred in sustaining the demurrer to the several answers which we have sufficiently pointed out in this opinion. The judgment of the circuit court will therefore be reversed and a new trial ordered.

Statement of Facts.

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15 277
17 636
22 605
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21* 882
30* 817

STATE OF OREGON, RESPONDENT, *v.* AH LEE, APPELLANT.

HOMICIDE—VIEW OF PREMISES BY JURY—PRESENCE OF DEFENDANT—WAIVER.—Where, on a trial for murder in the first degree, the court, upon the application of the state, directed a view of the place of the alleged killing by the jury: *Held*, that the omission by the court to provide for the presence of the defendant or his counsel at the view, no application therefor having been made by the defendant or his counsel at the time the view was ordered, was not error.

DYING DECLARATIONS—BELIEF IN THE CHRISTIAN RELIGION.—In order to render dying declarations admissible, it is not requisite that the deceased should have been a believer in the Christian religion at the time the declarations were made.

JURY MAY CONSIDER PROBABILITIES.—In determining the credibility of a witness, the jury may judge whether the statements made by the witness accord with their own experience in life, and their own knowledge of the motives, and interests, and passions which ordinarily influence men under such circumstances as those which surround the witness.

DELIBERATION AND PREMEDITATION—INFERENCE FROM FACTS.—Direct proof of deliberation and premeditation is not required, but may be inferred from proven facts. Three men, all armed with deadly weapons, made a simultaneous attack upon a third, in a Chinese Joss-house, and killed him—one having approached the deceased from behind, and without saying a word, struck him a deadly blow on the head with a hatchet, while the others fired two shots into his body in rapid succession: *Held*, that these facts warranted the jury in concluding that the killing was preconcerted, and that the design to take the life of the deceased was formed in cool blood.

APPEAL from Multnomah County.

On the twenty-fifth day of October, 1878, the appellant was jointly indicted with Lee Jong and Charlie Lee Quong for the murder of Chin Sue Ying. Lee Jong was never arrested. The others, the appellant and Charlie Lee Quong, were tried together, and convicted of murder in the first degree, and sentenced to be hanged on the seventh day of February, 1879. They appealed from the judgment to the supreme court at the January term, 1879. The judgment of the circuit court was reversed, and the case remanded for a new trial. The defendants then severed in their trials, and on the tenth day of July, 1879, the appellant was again tried and convicted of murder in the first degree, and sen-

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tenced to be hanged, from which judgment he again appealed to this court.

The evidence offered on behalf of the state tended to prove that on October 2, the day preceding the homicide, Charlie Lee Quong, one of the accused, complained to a policeman that the deceased had poured some offensively smelling liquid on the floor of the Joss room, and that he would have him arrested for it on the morrow. That the next day in the afternoon, while a number of Chinese were in the Joss-house, the deceased was standing on the floor with his back toward the appellant, when the latter raised a hatchet and struck the deceased a blow on the head with it. Deceased suddenly turned with his face toward the appellant, and while turning, he was shot twice by the other defendants, Lee Jong and Charlie Lee Quong, and immediately fell on the floor. The deceased had three wounds on the head, inflicted with a hatchet, and two in the body, made by pistol shots, either of which was regarded as necessarily fatal. From the effect of these wounds he died two days afterwards. There was also evidence tending to show that the appellant was seen to walk rapidly away from the Joss-house soon after the assault was made, and that he had apparently something concealed in his sleeve. The deceased became unconscious from the effect of the wounds, and remained so until the next day, when consciousness returned, and he was then questioned as to who inflicted the wounds upon him. He replied through a Chinese interpreter, to the effect that the appellant cut him and Charlie Lee Quong shot him. These statements were given when deceased believed he would die from the effect of the wounds, and were afterwards, during the trial, received in evidence as his dying declarations.

In his defense, the appellant offered evidence tending to prove that he was at home, sick in bed, at the time deceased was wounded; also the testimony of several Chinese witnesses to the effect that the deceased had come into the Joss-house having a piece of raw meat in his hand, which he was about to throw on the Joss, when Lee Jong, one of the persons named in the indictment (not arrested), ob-

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serving the action of the deceased, sprang at him and caught his arm, drew the hatchet from under his clothing and struck deceased with it, and then drew a pistol and shot him twice; but that neither the appellant nor Charlie Lee Quong participated in the killing of the deceased. There was no evidence offered or received on the trial as to whether the deceased believed in a future state of rewards and punishments, or to show whether he had any religious convictions whatever on the subject. It was proved that the deceased, and the witnesses who testified on behalf of the state that they saw the appellant strike him, were Chinese, and had attended the Chinese mission school in Portland; while all those accused in the indictment were worshipers of Joss.

After the evidence for the state was closed, on motion of the district attorney, an order was made by the court allowing the jury, accompanied by a bailiff having them in charge, to visit and view the premises and the Joss-house where the wounding of the deceased took place. The order made did not direct or provide for the presence of the appellant or his counsel at the view, and neither of them asked that they might be permitted to be present, and neither did the order exclude them from being present at the view if they had desired it.

Dolph, Bronaugh, Dolph & Simon, and Whalley & Fechheimer, for appellant.

John F. Caples, District Attorney, and M. F. Mulkey, for the state.

By the Court, KELLY, C. J.:

After the evidence on behalf of the state was closed, the court, at the request of the district attorney, made an order directing a bailiff to conduct the jury to the Joss-house for the purpose of viewing the place where the homicide occurred. The appellant and his counsel were present when the order was made, but did not object to it. The section of the statute under which the court ordered the view is as follows: "Whenever, in the opinion of the court, it is

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proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge or by a person appointed by the court for that purpose. While the jury are thus absent no person except the judge or the person so appointed shall speak to them on any subject connected with the trial." (Code, p. 145, sec. 195.)

It is now claimed by the counsel for appellant that the court erred in permitting the jury to visit the premises where the homicide took place in the absence of the appellant; that in making their view the jury necessarily received evidence from inanimate objects which might be prejudicial to the rights of the deceased, and it is urged that his failure to object to the making of the order for the view, was no waiver of his right to be present. The decisions of the courts in the different states are in direct conflict with each other on these points; but we consider the better doctrine to be that the failure of the accused to be present when the jury were making their view, is no ground of error. We are unable to see what good his presence would do, as he could neither ask nor answer any questions, nor in any way interfere with the acts, observations, or conclusions of the jury. He would have been only a mute spectator while he was there.

It appears from the records that when the district attorney moved the court for a view by the jury, the counsel for the accused stated that they were about to make the same motion. The appellant, if he desired to be present at the view, should then have made application for that purpose. If he had desired to see the place where the homicide took place, in order to be better prepared to make his defense, doubtless the court would have permitted him to accompany the jury in the custody of an officer. But failing to make known any desire to be present at the view, he must be deemed to have waived any privilege which he had in this respect. It was so decided in a well-considered case by the supreme court of Kansas, and to the principles laid down

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there we assent. (*The State v. Adams*, 20 Kansas, 311; *People v. Bonney*, 19 Cal. 426.)

The next objection urged is that the court erred in admitting the dying declarations of the deceased to go as evidence to the jury against the accused, and in support of this objection it is urged that as the deceased was shown to be a Chinaman, it must be presumed that he was a worshiper of Joss, and had the heathenish religion of his race, and that there was no evidence that he had any convictions in regard to a future life, or a moral accountability to a supreme being after death, or that he had any fear of future punishment in another world for false dying declarations made in this. Mr. Greenleaf in regard to dying declarations says: "The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath. It follows therefore that where the declarant, if living, would have been incompetent to testify by reason of infamy or the like, his dying declarations are inadmissible. And as an oath derives the value of its sanction from the religious sense of the party's accountability to his Maker and the deep impression that the declarant was incapable of this religious sense of accountability, whether from infidelity, imbecility of mind, or tender age, the declarations are alike inadmissible." (1 Greenleaf, sec. 157.)

Under the common law, one who does not believe in the existence of a Supreme Being who will punish false swearing in a future world, is incompetent to testify, and consequently the dying declarations of such a one would not be admissible in evidence under the common law. But the common law rule has been abrogated in this state: "No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony." (Article 1, sec. 6, constitution of Oregon.) As the deceased, under our laws, would have been a competent witness to testify in

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a court of justice, it follows that his dying declarations were admissible. (*People v. Sanford*, 43 Cal. 29.)

But as a matter of fact it does not appear from the evidence that the deceased was destitute of religious belief, and of a belief in future accountability. The record shows that he had been for some time attending a missionary school in Portland, and it may therefore reasonably be presumed that he had been taught the doctrines of the Christian religion, and that he was a believer in the Christian faith. Indeed, the evidence on the part of the accused tends strongly to prove that the fatal assault was made upon him because he had treated the Joss-house with disrespect and contempt. Under the common law, therefore, we consider that his dying declarations would have been admissible in evidence. We therefore consider that the court did not err in admitting them.

There was also an exception taken to the following sentence in the charge of the court: "You may consider the surroundings of the witness, you may consider the probability of the facts he narrates; whether or not those facts accord with the facts previously known or believed by you; that is to say, whether or not they accord with your experience, or knowledge, or previous belief, or, in other words, with the probabilities of the case."

It is claimed by the appellant that this instruction gave to the jury the right to determine the credibility of a witness by comparing his testimony with any knowledge or information which the jurors themselves may have had concerning the homicide, or opinions which they may have formed in regard to it before they were impaneled to try the case. We do not regard it as open to this construction. Taken altogether, we think that the court intended to convey to the jury the idea that in determining the credibility of a witness, they were to judge whether the statements made by him accorded with their own experience in life, and their own knowledge of the motives and interests and passions which govern or influence men under such circumstances as those which surrounded the witness. We do not consider this instruction of the court open to the objection made against it.

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We now come to the principal point relied on by the appellant to reverse the judgment, and which has been most strongly pressed upon the consideration of the court. It is contended "that according to law and the evidence as certified in the bill of exceptions, the appellant is not guilty of murder in the first degree, but in the second degree, conceding that he did participate in committing the homicide as testified by the witnesses for the state." The appellant's counsel, in support of this proposition, claim that there was no evidence whatever tending to show deliberation or premeditation on part of the accused, and that in order to convict, both deliberation and premeditation in the commission of the crime should have been proved beyond a reasonable doubt.

The crime of murder is defined in sections 506 and 507, page 406, of the code as follows:

"Sec. 506. If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree.

"Sec. 507. If any person shall purposely or maliciously, but without deliberation and premeditation, or in the commission or attempt to commit any felony, other than rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the second degree."

Section 519, page 407, of the code, further provides how the different degrees in the crime of murder shall be proven:

"Sec. 519. There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed in cold blood and not hastily upon the occasion."

Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done. Premeditation is where the intention to do an

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act has been formed before the attempt to execute it. It implies a prior intention to do the act in question; and it is claimed by appellant's counsel that there is no proof whatever that there was any deliberation or premeditation on part of the accused to take the life of the deceased; that his first connection with the crime, so far as the evidence discloses it, begins with the uplifted hatchet when he was in the act of striking the deceased; and that the intention to kill might have been formed at that instant upon a sudden heat of passion caused by an indignity offered to the idol which was the object of his worship.

Direct proof of deliberation and premeditation is not required under our statute, but may be inferred from proven facts; and in the case under consideration we think the evidence of a predetermination to take the life of deceased is very strong. The fact that in a house of worship, heathen though it was, two or three men should be armed with deadly weapons, is a very unusual thing. This was followed, as the evidence of the state tended to prove, by the appellant raising his hatchet behind the back of the deceased, and striking him a blow without saying a word. Simultaneous with this assault two shots were fired in rapid succession by the other defendants. Under these circumstances, we think the jury were warranted in coming to the conclusion that there was not only a preconcerted design to take the life of the deceased, but that this design was formed in cold blood. If the appellant was guilty at all, we can hardly see how they could have come to any other conclusion than that he was guilty of murder in the first degree.

While giving the charge to the jury, the court, in explaining to them what was required to show a premeditated design, said: "If a man, without uttering a word, should strike another in the head with an ax, it must be deemed a premeditated violence," and an exception was taken to this remark. This paragraph must be taken in connection with the surrounding circumstances of the case as they were disclosed to the jury by the evidence, and it must be viewed in the light of the facts as they appear in the bill of exceptions. The court doubtless intended to convey to the jury

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this idea, that if they believed the accused came up behind the deceased, and without uttering a word, struck him a deadly blow with an ax or hatchet, it would be presumed to have been done with premeditated violence. It was merely a mode of illustration to show what was required to constitute premeditation, and, we think, could not in any way have misled the jury.

Taken altogether, we find no error in the proceedings or the charge of the court, and it is ordered that the cause be remanded to the circuit court for further proceedings to carry the sentence of the court into effect.

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8	223
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8	222
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442	188
8	223
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8	222
448	202

E. CORPE, RESPONDENT, *v.* QUINCY A. BROOKS, APPELLANT.

SCHOOL BOARD—CO-ORDINATE DEPARTMENT—DECISIONS NOT REVIEWABLE.

The decisions of the board of commissioners for the sale of school and university lands, etc., are not the subject of review by the courts. The board is not an inferior court or tribunal over which the circuit courts have a supervisory control, but a co-ordinate department of the state government, whose discretion and decisions the courts can not control.

APPEAL from Marion County. The facts are stated in the opinion.

W. W. Thayer, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

The appellant, Brooks, on the sixteenth day of January, 1872, filed his application to purchase the land in controversy as swamp lands of the state, under the act of October 26, 1870. He afterwards paid twenty per cent. of the purchase price at one dollar per acre, to wit, twenty cents per acre, and on the fourth day of April, 1872, received of the board of commissioners a certificate of purchase for the lands which are lots 4, 5, 6, 7, 8, 9, 10, 15, and 16, in section 16, T. 40 S., R. 8 E., and are in Lake county. Said

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lands had been selected as swamp lands, and the selection was afterwards approved by the surveyor general.

On the twenty-sixth of September, 1876, Corpe, the respondent, filed an application with said board to purchase these same lots of land as school lands, claiming that these lands are school lands and not subject to be sold as swamp lands. This application the board rejected, on the ground that the land was in fact swamp, and that the state had already sold it as such to Brooks. On the fourteenth of December, 1877, the attorneys of Corpe instituted a contest before the board to obtain a deed for this land as school land. At the hearing of the contest on the fifteenth of January, 1878, the parties were heard by their attorneys, and the matter taken under advisement by the board, who on the sixth of March, 1878, rendered their decision in favor of Brooks.

Afterwards, upon the petition of Corpe to the circuit court of Marion county, a writ of review was granted to said board, and the decision of said board brought before said circuit court to be reviewed for alleged errors. And said court entertained the proceedings under said writ and reviewed said decision and reversed the same, and ordered that said board, upon payment by said Corpe of the appraised value of said land in controversy, execute a patent for said land to said Corpe. From this decision of the circuit court the appellant, Brooks, appeals to this court. Several questions have been presented by the counsel in the argument, which it will not be necessary to notice in this opinion, for the reason that we think a writ of review does not lie from the circuit court to bring before it for review the proceedings of the board of commissioners for the sale of school and university lands, etc.

This board was created by the state constitution and by it invested with the power to dispose of these state lands, and its powers and duties are such as are provided by law. It is composed of the governor, secretary of state, and state treasurer, and is a part of the administrative department of the government, and exercises its powers independent of the judiciary department, and its decisions are not subject

Points decided.

to be reversed by the court. It occupies in this state the same relation to the state judiciary as the land department of the United States does to the United States courts, and their decisions have not been the subject of review by the United States courts. It was held in the case of *Joseph Pin et al. v. James Morris*, that our late territorial courts could not revise the decisions of the surveyor general, and in that case Williams, C. J. says: "Congress has ordained a land department of the government, whose business it is made to determine those questions which arise out of the disposal of the public lands, and the courts of the country can not interfere to regulate or control that business without introducing uncertainty and confusion into the whole system." See also the case of *Board of Supervisors v. The Auditor General*, 27 Miss. 165. The board is the land department of this state, and their decisions as to who shall receive a patent to land is conclusive on the courts. But the courts may, on a proper showing, decree that the patentee holds the land as the trustee of one having a better right in equity. This board is not in any sense an inferior court or tribunal over which the circuit courts have a supervisory control, but a co-ordinate department of the state government, whose discretion and decisions the courts can not control.

The decision of the circuit court will be reversed and the writ of review dismissed with costs.

MARY J. ATTEBERRY, APPELLANT, *v.* THOMAS F. ATTEBERRY, RESPONDENT.

DIVORCE—CONDONED CRUELTY REVIVED.—While acts of cruelty will be presumed to be condoned by the continued cohabitation of the parties, they will be revived by the subsequent commission of acts of the same nature.

IDEM.—Any conduct which, after reconciliation of the parties in a case of cruelty, creates reasonable apprehension of personal violence, will revive the condoned cruelty.

MARRIED WOMAN—SEPARATE EARNINGS.—Under the law, as it now stands in this state, the wife is entitled to own and hold any property acquired with the proceeds of her own personal labor, and the husband has no right to compel her to turn it over to him.

Opinion of the Court—Prim, J.

APPEAL from Douglas County. The facts are stated in the opinion.

John Kelsay and Hermann & Ball, for appellant.

Wm. R. Willis, for respondent.

By the Court, PRIM, J.:

This suit was brought by the appellant for a dissolution of the marriage contract. In her complaint she charges cruel and inhuman treatment and personal indignities, rendering her life burdensome, and alleges that the defendant has frequently since their marriage threatened the plaintiff with violence, and at divers times struck and beat the plaintiff in a cruel and inhuman manner, and has continuously used threatening and abusive language toward the plaintiff, and kept her in constant fear for her personal safety. And that he did, on the thirteenth day of April, 1874, in Douglas county, Oregon, push the plaintiff in a rude and angry manner, and ordered her to leave their home, and threatened that he would burn the house down over her head if she did not leave, and compelled her to leave and seek shelter for the night at one of their neighbors. And that plaintiff has frequently within the year threatened that he would take the children of the marriage and remove them without the country, where the plaintiff could not see or hear from them. And that she was, on account of the indolence of the defendant, compelled to work and earn the support for the family.

The defendant answers, and denies the cruelty and the threats, or that he has struck or beaten the plaintiff, except in 1867 he struck her with a small switch, and in 1875 he slapped her in the face with his open hand, which he alleges were forgiven in January, 1878, and that the action was not commenced within the statutory time. The answer also denies that he threatened to remove the children from without the country, as alleged in the complaint, but admits that he told plaintiff if he had to give up all his property to her, he would take the children and leave the country.

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The plaintiff's reply denies that she forgave the acts of cruelty admitted by the defendant in his answer, and assigns that her reason for living with him after those acts was on account of the tender years of their children, and with the hope and desire that he would reform his conduct toward her, and cease to treat her in a cruel and inhuman manner.

The court decided against the plaintiff, and gave judgment dismissing her bill, and a judgment for costs and disbursements in favor of the defendant, from which the plaintiff appeals.

From the evidence and pleadings it appears that the plaintiff and defendant were married to each other in the year 1865, in the state of Illinois, where they resided for several years, and until they moved to Oregon. There are three children, two sons and one daughter, the issue of said marriage. The boys are thirteen and ten years of age, respectively, and the daughter seven. That in a short time after their marriage, the cruel treatment of defendant was commenced by slapping the plaintiff in the face with his open hand, and by threatening to boot her; and at another time, after their removal to Oregon, about the year 1873, by slapping her in the face without any apparent provocation. These parties continued to cohabit together as husband and wife until the thirteenth of April, 1879, at which time a final separation took place, since which time they have remained apart.

The causes which led to the separation appear to be as follows: She was the owner of some property, consisting of horses and cattle, about seventeen head in all. The property had been purchased with money earned by her own personal labor in the manufacturing and sale of gloves, in washing clothes, in sewing, and in the making of butter for sale, etc. The place upon which they were residing was a piece of government land, the improvements upon which had been paid for with money earned also by her personal labor. That the money to pay for this land had also been furnished by her, but the defendant had managed in some way to procure it from the land office and spend it. That on the morning of the thirteenth of April, 1879, he in-

Opinion of the Court—Prim, J.

formed the plaintiff that she must turn over all the stock to him, and allow him to have the full control of the same, or neither she nor the stock could remain on the place any longer. That if she refused to comply with his request in this respect, he would make it hot for her, and threatened to burn the house over her head.

The plaintiff feeling aggrieved at the injustice of this demand of the defendant, and not being fully advised as to her rights in the premises, saddled a horse and went off to consult a neighbor in relation to the matter. Returning in the afternoon about four o'clock, she unsaddled the horse and turned it into the pasture, when the defendant, in order to make an exhibition of his authority and carry out his threat, undertook to turn the animal out of the pasture. The plaintiff went to the gate and undertook to prevent him from so doing, when the defendant shoved her away in a rude and angry manner, saying that neither she nor the animal could remain on the place. The plaintiff then went away and never returned to him again. A Mrs. Butler, who was residing at the house with them, testifies that on another occasion, in April, 1879, she was present when the defendant drew a chair upon the plaintiff in a threatening manner and was prevented from striking plaintiff by her stepping in between them and begging him not to strike her.

It also appears that after the commencement of this suit the defendant went to Canyonville, where plaintiff had their daughter for the purpose of attending school, and took her away from her by force, and because the plaintiff caught him by the coat and thus endeavored to prevent him from taking the child off where she could never see her again, he knocked her down. This assault, having been made since the commencement of the suit, can not be considered as one of the grounds for the divorce. Two of the acts of cruelty specially charged in the complaint as having been committed in the years 1867 and 1875, respectively, are admitted by the defendant, but it is claimed by him that these acts were specially forgiven by the plaintiff about June, 1878.

Plaintiff, however, denies that those acts were specially forgiven by her, and assigns as a reason for living with him

Opinion of the Court—Prim, J.

after the commission of those acts the tender years of their children and the hope that he would reform his conduct toward her and cease to beat her in such a cruel and inhuman manner. There being no special condonation proved, none existed, except such as must be implied from continued cohabitation of the parties after the commission of said acts. But while the acts were condoned by the continued cohabitation of the wife, they were revived by the subsequent commission of acts of the same nature. "Any conduct which, after reconciliation of the parties in a case of cruelty, creates reasonable apprehension of personal violence, will revive the condoned cruelty; in fact, it is cruelty itself." (2 Bish. Mar. and Div. 58; *Gardner v. Gardner*, 2 Gray, 434.)

"To revive condoned cruelty there must be something of the same kind as would have supported a suit originally for cruelty, such as violence or threats of violence; but the acts need not be of the same stringent kind; something short will be sufficient, provided it be shown that the husband continues in the same state of mind, and is incapable of controlling himself, as when he actually committed the former acts of cruelty." (*Davis v. Davis*, 55 Barb. 55.) Legal cruelty is defined by Mr. Bishop to be "such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duty." (1 Bish. Mar. and Div. 715.)

We think the charge of cruel and inhuman treatment is fully sustained by the evidence, when all the acts of cruelty are considered together, and that plaintiff is entitled to a divorce.

It is, therefore, ordered that a decree be entered dissolving the bonds of matrimony existing between plaintiff and defendant; that plaintiff have the care and custody of their infant daughter, Marie Catherine Atteberry, and costs and disbursements.

Decree of the court below reversed.

Statement of Facts.

STATE OF OREGON, RESPONDENT, *v.* H. C. DALE,
APPELLANT.

INDICTMENT—DISTINCT CRIMINAL ACTS.—Where the statute makes the commission of different acts a crime, and uses the word *or* connecting these acts, an indictment is good which charges the defendant with the commission of more than one of such acts, using the conjunction *and* to connect them in the indictment.

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48	147
48	178
8	229
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JUROR—OBJECTION TO PANEL.—Where an objection to a juror is that he is drawn from a particular panel, and not that the juror is personally disqualified or improperly summoned, such objection is a challenge to the panel.

SHERIFF—CONVERTING MONEY—PROOF OF SUMS COLLECTED.—In a prosecution of a sheriff for converting money collected by him as taxes, it is competent to show that he received sums of money from different individual taxpayers.

ITEM—CONVERSION OF PUBLIC MONEY IS LARCENY.—Money collected by a sheriff for taxes is the property of the county in the hands of the sheriff, and he may be guilty of larceny by converting the same to his own use.

APPEAL from Yamhill County.

The defendant was sheriff and tax collector of Yamhill county from July 1, 1876, to July 1, 1878. He was indicted by the grand jury of said county at the March term of the circuit court of said county for 1879, for larceny of public money.

The crime charged is described in the indictment as follows: "As such sheriff and tax collector of said Yamhill county, said H. C. Dale had received and had in his possession in said Yamhill county on the seventh day of August, A. D. 1878, the sum of three thousand dollars in gold and silver coin of the United States of America, belonging to and being the property of said county of Yamhill, which said money he had received and collected between the fifteenth day of September, A. D. 1877, and the seventh day of August, A. D. 1878, as taxes, assessed and duly levied by the county court of said county, and that the said H. C. Dale on the said seventh day of August, A. D. 1878, in said Yamhill county, state of Oregon, then and there being, and having in his possession said sum of three thousand dollars, which belonged to, and was the personal property of said

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Yamhill county, Oregon, and which he had collected and received as taxes as aforesaid, did then and there fraudulently and feloniously, take, steal, make away with, embezzle and convert to his, H. C. Dale's, own use, the said three thousand dollars, and then and there neglected and refused to pay over, and does still neglect and refuse to pay over to said county of Yamhill, said three thousand dollars, or any part thereof, as by law directed and required; said county of Yamhill being all of said time a public corporation in the said state of Oregon, and the grand jury being unable to give or ascertain a more definite description of said money than that above given. Contrary to the statute," etc.

Upon the trial the jury returned the following verdict: "We, the jury in the above-entitled action, find the defendant guilty as charged in the indictment, and find that the amount of money converted was the sum of twenty-five hundred dollars."

The defendant was fined five thousand dollars and sentenced to five years' imprisonment.

The indictment is based upon section 559, page 414, of the criminal code, which is as follows: "If any person shall receive any money whatever for this state, or for any county, town, or other municipal corporation therein, or shall have in his possession any money whatever belonging to such state, county, town, or other corporation, or in which such state, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof, as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of larceny," etc.

The appellant claims that this section does not include the acts of the tax collector, and that the appellant was liable only under section 65, p. 763, of the General Laws, which is in the following words: "The sheriff shall pay over all moneys collected by him, on any tax list in his hands, to the treasurer of the county at least once a month, taking a duplicate receipt for the same, which he shall file with the

Opinion of the Court—Boise, J.

clerk of the county court of his county immediately thereafter; and any sheriff failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor," etc.

The appellant further claims that the court erred in permitting the prosecution to show the receipt by the appellant of more than one sum of money from different persons; that if the appellant was guilty, the receipt of different sums from different persons on the conversion, constituted distinct offenses triable by separate indictments.

An exception was taken to the ruling of the court, upon a challenge to one of the jurors. The facts which explain this exception are stated in the opinion.

R. Williams and McCain & Fenton, for appellant.

J. J. Whitney, District Attorney, and W. M. Ramsey, for the state.

By the Court, BOISE, J.:

The appellant claims that the indictment in this case does not charge a crime. There was no demurrer filed to the indictment in the circuit court, and the appellant has, in the argument, failed to point out any defect in the indictment except this: It is claimed that it charges the defendant with converting the money and also with having failed to pay it over. Either of these acts would be a crime, and as he is charged with larceny by converting the money and failing to pay it over, we think a charge in this conjunctive form is good; if these acts had been charged in the disjunctive form, that he either converted or failed to pay over the money, the indictment would have been bad. In the case of *The State v. Carr*, 6 Or. 133, it is decided that "when a statute makes the commission of different acts a crime, and such acts are stated disjunctively in the statute, the indictment may, as a general rule, embrace the whole of such acts in a single count, but it must use the conjunctive *and* in the indictment when *or* occurs in the statute. The rule laid down in that case is applicable in this case, and tried by that rule this indictment is not bad for duplicity.

Opinion of the Court—Boise, J.

The next point argued as error is that the jury was improperly drawn. It appears from the bill of exceptions that on the eighth day of October, 1879, the day the cause came on to be heard, the court made an order as follows:

“Order for thirty jurors, October 8, 1879.

“It appearing to the court that the number of jurors required by the code to attend the court have not attended, and that the panel is not full, it is ordered that the sheriff of this county summon forthwith, from the body of the county, thirty good and lawful men, having the qualifications of jurors, to serve during the term.”

It also appears that these thirty jurors were summoned pursuant to said order and their names placed in the jury box, “there being in said box at the time, the names of twenty jurors of the required panel, who were in attendance to serve and who were serving as jurors. The defendant, by his attorneys, objected to a jury for the trial of said cause being drawn from said box, and objected to each and every one of said jurors so drawn; but the court overruled the objection and the jury was drawn and impaneled from said box, to which ruling the defendant excepted.”

The jurors whose names were in the jury box constituted the panel. (Stat. p. 142, secs. 178, 179.) The objection was made to this panel as being illegally made, and the objection to each individual juror was made on the ground that he was drawn from this panel, and not on the ground that he was personally disqualified, or that he was biased. We think the objections made to the jurors were challenges to the panel and not to the individual jurors. If, when a juror was drawn, the counsel had objected to him for the reason that he was not one of the jurors on the regular panel, it would present a different question, and we might then be called on to decide whether the court had the authority to call jurors before those on the regular panel were exhausted. There is nothing in the record showing whether the persons who were drawn as jurors were of the regular jurors or of those summoned by the order of the court. We think that, in order to raise this question, the objection should have been made to the individual juror that he was improperly and

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illegally drawn or summoned, for it may be that all the jurors who were drawn were of the regular panel. It is claimed that these names being placed in the jury box made the whole panel illegal, and was such an irregularity as will vitiate the verdict.

By the statute, when, for any reason, there is not a full panel, the court may order the sheriff to summon forthwith, from the body of the county, persons having the qualifications of jurors, to serve during the term. It appears in this case that the number of jurors required by the code did not attend, for there were but twenty regular jurors on the panel. So the court had the power, in part, to make up the panel. This power has, we think, generally been confined in the circuit courts to making orders to fill up the panel to twenty-four trial jurors, the number provided for in the code.

But the statute does not limit the order to that number in express words. Still, it would seem that the object of the statute was to enable the court to supply the panel with the number of jurors provided in the code to make a full panel. When, however, this power is exercised by the court, it is for the purpose of making the panel of jurors and the jurors added by the order of the court as much a part of the panel as those who have been regularly drawn from the jury list, and if there be irregularity in making up this panel, still the panel is not the subject of challenge, for challenges to the panel have been abolished. (*State v. Fitzhugh*, 2 Or. 272.) If the order was void by reason of having directed the summoning of thirty instead of four jurymen, we think that matter could only be taken advantage of by an objection to the individual juror, that he was not summoned as a juror and had no authority to sit.

We think that under section 178 of the code, the court may direct the sheriff to summon any number of jurors from the body of the county for the trial of a particular case, to be used when the regular panel is exhausted, and though we think there was an irregularity in this case, still it does not appear that a substantial right of the defendant was

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affected by it, for it does not appear but what he was tried by jurors from the regular panel drawn from the jury lists.

After the jury was impaneled the prosecution offered record evidence to show that the defendant was, at the time he converted the money, the sheriff of Yamhill county. This was objected to by the defendant's counsel for the reason that it was incompetent. We think this evidence was competent to show in what capacity the defendant received and had the money. So, also, we think it was competent for the prosecution to prove the delinquent tax list filed by the sheriff, for this was an exhibit in his favor to show that he had not received all the taxes charged to him, and to charge him with the amounts which he by his entries thereon had charged himself with having collected. We think it was competent to prove, by any competent evidence, what sums the defendant had received at various times as sheriff, in order to show how much money belonging to the county came into his hands. He may have received sums with the intention to account for them and pay them over to the county treasurer. It was proper for the prosecution to show, by items received by him, the amount that came into his hands, and then show how much he paid over, to show the amount of his default; for if he returned a large sum of money belonging to the county, and refused to pay it over according to law, it was some evidence that he had converted it to his own use.

If an agent is accused of embezzling the funds of his employer, it would be competent to show that he received a sum from A. at one time and from B. at another, and that he had at another time converted both sums to his own use. The receipts would be lawful, and the crime consists in the unlawful commission, which may be one act. That is, an agent may be mouths in collecting the funds of his principle, and when he has a large amount collected, convert the aggregate to his own use at once.

Again, it is claimed by the appellant's counsel, that taxes, while in the hands of the sheriff, are not the property of the county. We think this position is not tenable. The sheriff is the agent of the county, and when he receives the

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taxes and receipts for them, such taxes are the property of his principal, for it is a general rule that where an agent collects money for his principal, the money vests in the principal when received by the agent, according to the maxim, that what one does by his agent he does himself. The state tax due from each county, when paid to the state treasurer by the county treasurer, is the money of the county until paid to the state treasurer; and if destroyed by fire or act of God before being paid over, would be lost by the county; the property in money paid for taxes passes to the county when it is paid by the taxpayer to the sheriff, who is the officer and agent of the county.

It is further contended by the counsel for the appellant that as he collected the money as tax collector and sheriff, and failed to pay it over, he could only have been indebted under section 732 of the statute, which provides that "any sheriff who shall neglect or refuse to pay over all moneys by him collected for taxes, or shall refuse or neglect to make a return of the delinquent taxes of his county as required, * * * shall be liable to be indicted therefor, and upon conviction, may be punished by fine not less than one hundred nor more than one thousand dollars, or by imprisonment not less than six months nor more than six years." * * * This statute provides for punishing criminal negligence in the sheriff, and appellant might have been indicted under that section for failing to pay over the money by him collected as tax collector, although there was no conversion of the funds and no felonious intent.

Section 559 defines a higher and more heinous offense, and as both statutes were passed by the same session of the legislature, the presumption is that it was the intention of the legislature that both sections should stand. Section 559 defines a crime not mentioned in section 732, when it uses the words: "And shall in any way convert to his own use." * * * This makes the conversion of the public funds a crime, and this is the crime charged in the indictment, and for this the appellant could not be punished under section 732. It is true the section makes neglect or refusal to pay over, a crime of equal magnitude as conver-

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sion, and uses the same language in defining it as in section 559. If section 732 was held to repeal that part of section 559 which makes a neglect or refusal to pay over a crime, it would leave the remaining portion of the section standing, and that remaining portion which provides against conversion would support this indictment. We think it was the intention of the legislature that both these sections should stand, and that they are in force, and that a sheriff is embraced in section 559 as much as any other officer, for he is included in the words "any person."

The points above discussed embrace all the important questions raised in the case, and as there is no substantial error, the judgment of the court below should be affirmed.

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THE STATE OF OREGON, RESPONDENT, *v.* JAMES McCORMACK, APPELLANT.

LARCENY OF DIFFERENT ARTICLES, ONE OFFENSE.—Where a person is charged with the larceny of a horse, saddle, and bridle, taken at the same time and place, and from the same person, the whole transaction constitutes but *one crime*, and but *one indictment* can be sustained for such taking, and if the prosecution see proper to split up the transaction into two offenses, by causing two indictments against such person for that which is but *one crime*, a conviction or acquittal on one may be pleaded as a bar to a subsequent prosecution on the other.

IDEM.—When a man has done a criminal act the prosecutor may carve as large an offense out of the transaction as he can, yet he must cut only once.

APPEAL from Douglas County. The facts are stated in the opinion.

Bonham & Holman, for appellant.

There was no appearance for the state.

By the Court, PRIM, J.:

The appellant was indicted by the grand jury of Douglas county for the crime of larceny of a saddle and bridle, alleged to have been stolen from one James Doolin, on November 1, 1879, to which indictment he pleaded guilty as therein

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charged, and for which he was duly sentenced. At the same term of court, the appellant was also indicted for the crime of larceny of a horse alleged to have been stolen from said James Doolin, at the same time and place as in the indictment above mentioned. To this second indictment the appellant pleaded not guilty, together with a plea of former conviction for the same offense. The evidence, as reported in the bill of exceptions, shows that the horse, saddle, and bridle were taken by the appellant at the same time and place, and from the same person. The indictment and judgment of conviction on the charge of larceny of the saddle and bridle were admitted in evidence without objection. The appellant was convicted and sentenced for the larceny of the horse as charged in the second indictment, and from this judgment an appeal has been taken to this court.

The circuit court, among other things, instructed the jury as follows: "That a former conviction and judgment against the appellant of the crime of larceny of a saddle and bridle, taken at the same time and place from the same person, in the same transaction as the horse, for which he has been indicted, and is now being tried, is not a bar to the prosecution for the larceny of the horse, and will not sustain the plea of a former conviction entered by the appellant in bar of this prosecution."

To the giving of this instruction, appellant, by his counsel, then and there excepted, and assigns it here as error. This raises a very important question to be for the first time passed upon by this court, and it is therefore to be regretted that the state was not represented by counsel upon the argument.

It is stated, however, by counsel for appellant, that it was necessary to bring two indictments, because the larceny of the horse would be punishable under section 555 of the criminal code, while the larceny of the saddle and bridle would be punishable under section 552. The former of these two sections provides that if any person shall be convicted of stealing a horse, etc., he shall be punished by imprisonment in the penitentiary from one to fifteen years;

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while under the latter, he can be imprisoned in the penitentiary not less than one nor more than ten years, if the goods or chattels stolen shall exceed in value thirty-five dollars; but if the property stolen shall not exceed the value of thirty-five dollars, he shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars.

This proposition may be answered in the words of Mr. Chief Justice Shaw, as follows: "It is not necessary in an indictment upon a statute to indicate the particular section or even particular statute upon which it is founded. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also when the indictment was found. And if the facts, properly laid in the indictment and found by the verdict, show that the act done was a crime punishable by statute, it is sufficient to warrant the courts in rendering judgment. (*Commonwealth v. Griffin*, 21 Pick. 525; *Commonwealth v. Squire*, 1 Met. 261; *Fisher v. Commonwealth*, 1 Bush. Ky. 216.) In the last case above referred to, the prosecution undertook to draw the same distinction in regard to the difference between the offense designated as horse-stealing and that of simple larceny, but was overruled by the court as being a distinction not well taken. "This plea of a former conviction, like that of a former acquittal, is founded upon that great principle and fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offense. This is one of the ancient and well-established principles of the common law, sanctioned and enforced in different forms of words in most of the constitutions of the several states, and in that of the United States. In the latter it is thus expressed: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'"

This clause having been adopted in our constitution as a fundamental principle, may be considered as equivalent to a declaration of the common law principle, that no person shall be twice tried for the same offense. But in the appli-

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cation of this maxim, it must be considered in each particular case in which it is relied upon as a bar, whether as a matter of fact the party seeking to avail himself of it has before been put in jeopardy, and if so, whether it can be said to be for the *same offense*. If these circumstances should be found not to concur, the maxim will not apply to the case. It now remains to apply this maxim to the case under consideration.

This is a case where the appellant is charged with the larceny of a horse, saddle, and bridle, taken at the same time and place, and from the same person, and in our opinion the whole transaction constitutes but one crime, and but one indictment can be sustained for such taking, and the prosecution having seen proper to split up the transaction into two offenses by causing two indictments to be preferred against such person for that which is but one crime, a conviction or acquittal on one may be successfully pleaded as a bar to a subsequent prosecution on the other. In 1 Bishop's Criminal Law, sec. 1060, it is said, "that although when a man has done a criminal thing the prosecutor may carve an offense out of the transaction as he can, yet, he must cut only once." The same author, in referring to offenses embraced in the same transaction or included one within the other, says: "Some apparent authority, therefore, English and American, that a jeopardy for the less is no bar to an indictment for the greater, we must regard as not being good law, while the doctrine that it is a bar is best sustained by the adjudications, as well as by reason." (1 Bishop's Crim. Law, sec. 1057.)

The case of *Fisher v. The Commonwealth*, reported in 1 Bush. 211, is a case precisely in point. In that case, Fisher, by the same act and with the same intent, took a horse, wagon, and harness, the property of the same person. Two indictments were found against him, one for stealing the horse, the other for stealing the wagon and harness. On the trial for stealing the horse, Fisher pleaded not guilty and was acquitted. This acquittal was held to be a good plea in bar against the indictment for stealing the wagon and harness. In *Roberts v. The State*, 14 Georgia, 8, the

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same principle was fully recognized. (*Hinkle v. The Commonwealth*, 4 Davis, 518; *The State v. Chaffin*, 2 Swan, Tenn. 493; *Lamphen v. The State*, 14 Ind. 327.)

Being of the opinion that the court erred in giving the instruction complained of, the judgment is reversed and the cause remanded to the court below for a new trial.

Judgment reversed.

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**M. ROSENDORF AND H. HIRSCHBERG, APPELLANTS,
v. J. A. BAKER, RESPONDENT.**

EVIDENCE—COPY OF LOST INSTRUMENT—QUESTIONS FOR JURY.—Where an instrument in writing is pleaded as a defense in an answer, and the making of the instrument is denied in the replication and on the trial, the original having been proven to be lost, a pretended copy produced and sworn to by two witnesses as a true copy, and the plaintiffs offer evidence tending to prove that no contract was executed, it is a question for the jury whether the paper produced is a copy of the lost paper, and whether it was executed between the parties.

CHATTEL, TITLE IN VENDOR AFTER DELIVERY.—When a chattel is delivered to one who has bargained for the purchase thereof, and agreed to pay therefor at a future day under an express contract that no title is to vest in him until payment, the property of the vendor is not divested, and the purchaser takes, at most, only a right by implication to the use of the chattel until default in the stipulated payment.

INSTRUCTIONS MUST BE PERTINENT.—The court may refuse to give instructions asked for when they are not pertinent.

APPEAL from Marion County.

This is an action for the conversion of an organ. The appellants claimed title to the organ through a purchase from D. L. Hedges, in September, 1878; the respondent, to defeat the claim, introduced testimony tending to show that Hedges never owned the organ; that he held it under a written agreement between himself and S. A. Nichols, executed in September, 1877, by the terms of which said organ was to be the property of Nichols until paid for, and that it had not been paid for; the pretended agreement was lost, and it is claimed that the following is a copy, excepting that it contains no signature by Hedges and no date, to wit:

“ Received from S. A. Nichols, one Burdett organ, of the

Statement of Facts.

value of one hundred and forty dollars, for which I executed and delivered to said S. A. Nichols my promissory note bearing date of September 1, 1877. Now, therefore, if I fail to pay according to the terms of the said note, I do hereby agree to pay to said S. A. Nichols the sum of five dollars per month rent for the organ, and to relinquish all claim on the organ and to return the same to said S. A. Nichols at my own expense; and it is further agreed that the said organ shall belong to and be the property of the said S. A. Nichols until the said sum of money is all paid. When this sum of one hundred and forty dollars, the value of the organ, is all paid, the said organ, together with this contract, shall belong to and be delivered to David Hedges. (Signed,) S. A. NICHOLS."

Hedges testified that he never executed said pretended agreement; that he purchased said organ from Nichols by an absolute parol sale, and gave his promissory note therefor, which matured about September 1, 1878. The testimony and the answer of the defendant showed that Nichols, in October, 1878, obtained in said circuit court judgment on said notes, and compelled the defendant, as sheriff, to sell said organ, as the property of Hedges, on an execution to enforce said judgment.

Among other things the court charged the jury as follows, to wit: "The defendant offers in evidence a copy of said written agreement. And this paper (holding in his hand the pretended copy above referred to) having been proved to be copy, and admitted in evidence, it becomes my duty to construe it." Also the following: "Whether it was wise, or unwise, for Hedges to make such a contract is not for us to determine. We are to take it as it is and give to it its legal effect." Also, the following: "Unless you find that Hedges obtained a title otherwise than by or under this instrument, of which this is a copy, he did not own the organ."

The jury found for the respondent and he had judgment, from which this appeal is taken.

B. Hayden and W. M. Ramsey, for appellant.

Opinion of the Court—Boise, J.

John Kelsay, for respondent.

By the Court, BOISE, J.:

It is claimed by the appellants that the court erred in instructing the jury that the copy of the written instrument, set out in the answer, was proved to be a true copy of the lost paper. That the fact as to whether it was a copy or not was a fact for the jury and not for the court. The paper being lost and a pretended copy being produced, this being secondary evidence, it was necessary for the party producing it to show that the original was lost and could not be produced. The question of the loss was for the court. This being determined in the affirmative, then it was necessary to prove the copy. It seems from the report of the case that what was claimed to be a copy, except the date and signatures, was produced and sworn to by two witnesses, who said the original had been signed. The copy so sworn to was admitted in evidence without objection on the part of the plaintiffs, who afterwards called as a witness Hedges, who testified that he did not sign this contract or any other contract in writing. The defendants had produced their copy, and the only material question was, whether or not Hedges had signed the original; that is to say, one precisely like the one produced. If it varied in substance or form from the original, Hedges could truthfully swear that he had not executed such a contract. There was no question before the jury as to whether or not there had been some other contract executed by the parties. The question was, therefore, necessarily confined to the copy produced by the defendant.

Counsel for the plaintiffs claim that two questions were raised for the jury: 1. Was the paper produced a copy of the instrument between the parties; 2. Was it executed by the parties. We think there was but one question, and that was, Was an instrument like the one produced signed by the parties? and this question was left to the jury, and there was no error on this point.

Again, it is claimed that the court erred in construing the writing. In this case the organ by the terms of the contract was to remain the property of Mrs. Nichols until

Opinion of the Court—Boise, J.

paid for. There can be no mistaking the understanding of the parties, and it was binding on them, and subject to be enforced according to its true meaning and intent, unless it contravened some legal principle; and the organ became the property of Hedges by virtue of the delivery only.

In the head note to the case of *Henry v. Hoppock*, 15 N. Y. 409, it is declared that "when a chattel is delivered to one who has bargained for the purchase thereof, and agreed to pay therefor at a future day, under an express contract that no title shall vest in him until payment, the property of the vendor is not diverted, and the purchaser takes, at most, only a right by implication to the use of the chattel until default in the stipulated payments." That case is like this in principle, and we think such is the law as generally settled. (See *Benjamin on Sales*, secs. 320, 411, 412, and *Forbs v. Marsh et al.* 15 Conn. 384.)

Again, it is claimed that the court erred in not giving the following instruction, which was requested to be given to the jury by the counsel for the appellants: "If the jury believe from the evidence that Mrs. Nichols had the organ in question sold as the property of Hedges, under the judgment which she obtained against Hedges on the notes for the organ, that she is estopped to claim that the title to the property was in her at the time; that is, at the time she had it sold." This question, we think, was not pertinent to the case, or any issue in the evidence.

The plaintiffs claimed the organ by virtue of a sale to them made in September, 1878. Mrs. Nichols did not levy on the property until October, 1878. We have already held that Hedges did not have the title by virtue of the written contract, under which it is claimed by defendant. He was claiming it at the time he sold to the plaintiffs, and it might be that Mrs. Nichols was the owner at that time and claimed the organ as her property; and if the jury found that the written contract was executed as claimed, then she was the owner at the time of the sale to the plaintiffs. She might afterwards, on making a demand for its delivery, or regarding Hedges as having forfeited his obligation by not paying the notes, or having tried to sell and thereby convert the property,

Statement of Facts.

have concluded to treat him as the owner, and she would not be estopped from claiming that she was the owner until she did some act that was inconsistent with such ownership, and there is no evidence that she did such act until she levied on the organ as the property of Hedges, which was on the fourth of October, 1878, and after the sale to plaintiffs by Hedges. To make this act of hers an estoppel in favor of the plaintiffs, it must appear that the act creating the estoppel transpired before the sale by Hedges to plaintiffs. So that this act of hers, being after the sale to Hedges, could not operate as an estoppel in this case. And as to whether such an act would be an estoppel, provided it had occurred before the sale by Hedges to plaintiffs, we do not decide. It is enough that we hold that the levy is not an estoppel in this case.

We have found no error in this case, and think the judgment of the court below should be affirmed.

8	244
21	316
22	598
22*	69
30*	431

H. H. HAYDEN, APPELLANT, v. SAMUEL LONG, RESPONDENT.

8	244
26	393
38*	194
8	244
29	263
8	244
40	273

JUROR—REVIEW OF RULING ON CHALLENGE.—This court will not review the ruling of the court below, on a challenge for actual bias in a juror, unless all the evidence upon which that court acted is reported to this court.

WATER RIGHTS—DIVERTING STREAM—INSTRUCTIONS MUST BE PERTINENT.—H. is the owner of the land through which a small stream of water runs, used by him for propelling machinery. L., not being the owner of any land adjoining said stream, went above the land of H. and diverted a portion thereof from its natural channel, and conducted it over and across the lands of other persons to where it was used for irrigation and other purposes, by means of which portions thereof were wasted. *Held*, that such diversion was unlawful, and while the instructions of the court contain a correct statement of the law as to the respective rights of riparian owners, they were inapplicable to the facts developed in this case, as the diversion was made in this case by a party who was not a riparian owner.

APPEAL from Polk County.

This is an action for the abatement of a nuisance and for damages, brought under section 330 of the code.

Opinion of the Court—PRIM, J.

The complaint alleges that during all the time hereinafter mentioned, the appellant was the owner in fee simple and in the possession of certain real property on which is situated a machine shop, and reservoir, or pond of water, belonging to the appellant, and continually used by him as a water power in the manufacture of machinery, furniture, and wagons; which same pond of water and water power is fed by a small stream of water, which said stream of water the respondent wrongfully and unlawfully diverted from its natural and usual channel by wrongfully and unlawfully tapping the same above the land of the appellant, and conducting a large portion of it across the land of others by means of artificial ditches, by reason of which wrongful diversion large quantities of said water are constantly absorbed, and large quantities of earth are constantly washed and carried into appellant's said pond, to the nuisance of the said machine shop, water power, and land, and to his damage in the sum of seventy-five dollars.

The respondent had a verdict and judgment, from which this appeal is taken.

B. Hayden, W. H. Holmes, and X. N. Steeves, for appellant.

R. S. Strahan and John J. Daly, for respondent.

By the Court, PRIM, J.:

The first assignment of error is that the court erred in admitting S. B. Frazier to serve as a juror at the trial of said cause. The bill of exceptions discloses that upon said Frazier being challenged for actual bias, on behalf of the appellant, he was examined under oath, as follows:

1. Were you a juror in the case of *Brown v. Long*, tried here yesterday? Answer: "I was." 2. Have you formed any opinion, from the evidence in that case, relative to the diminution or absorption of water from the stream in question, in consequence of the diversion of a part of the same by defendant, Long? Answer: "I have." 3. Have you that opinion now? Answer: "I think I have."

The bill of exceptions does not purport to give all the

Opinion of the Court—Prim, J.

evidence given on the trial of this challenge. In the case of the *State v. Tom* (*ante*, 177), this court held that it would not receive the ruling of the court below, in a matter of this kind, unless all the evidence introduced in the court below is reported to this court.

The next error complained of is as to the instructions of the court. It appears from the bill of exceptions that there was evidence at the trial tending to show that, by the flow of water through the ditch dug by the respondent, portions thereof were wasted by absorption, evaporation, and percolation, and that the quantity of water in said stream was small, and all needed by the appellant in driving the machinery of his said factory. The court instructed the jury as follows: 1. "Every person through whose premises water naturally flows has a lawful right to the flowing of the water in its natural channel, and no person has a right to divert the stream or any part of it from its natural channel, unless he causes it to return again before it leaves his premises, so that it will not injure those below, and be lessened or diminished only by such quantity as may be necessarily used for domestic purposes and watering stock, and in some cases for irrigation; and also by evaporation, and natural and necessary wastage." 2. "Defendant had a right to take as much of the water in the stream in question as was necessary for domestic uses, and if his convenience required it he has a right to divert a portion of the stream from its natural channel; but he must return so much of it as he does not use for such purposes, or is lost by evaporation or unavoidable wastage, to the stream before it reaches plaintiff's premises." 3. "If he diverts the water and does not so return it, and thereby the plaintiff is damaged, then the diversion is wrongful, and the plaintiff is entitled to a verdict in some amount of damages to be fixed by you." * * * 4. "If, from the evidence, you find that the defendant did divert the water and did not return it before it reached the plaintiff's land, then the plaintiff is entitled to damages if sustained by him. But if, on the contrary, you find that he did not divert or turn the water, or if he did divert it and turned it all back to its natural channel above plaintiff's

Points decided.

place without greater waste than was consistent with his use of the water, as before stated, then you should find for the defendant."

While these instructions contain a correct statement of the law as to the respective rights of riparian owners, they were inapplicable to the facts developed by the pleadings in this case, and should not have been submitted to the consideration of the jury. They are based upon the theory that both parties are riparian owners of the land lying along and adjoining the stream in question, whereas it appears from the pleadings that respondent is not such owner. In fact, it fails to appear that he is the owner of any land anywhere; but it is admitted that he diverted a large portion of the water of the stream from its natural and usual channel, by tapping the same above the land of appellant in the public highway, and conducting it across the said road and over land owned by other men, by means of artificial ditches. If the respondent had been the owner of the land adjoining the stream where this diversion was made, then the instructions would have been applicable to the case. But the appellant, being a riparian owner, was entitled to have the water run through his place, undiminished by the use of any one, except such as own the land adjoining the stream above his land. We hold that the instructions complained of were improperly submitted to the consideration of the jury, and that the judgment be reversed, and the cause remanded to the court below for a new trial.

Judgment reversed.

W. R. FINDLEY, RESPONDENT, *v.* H. TAYLOR HILL
AND M. SCRAFFORD, APPELLANTS.

CONSIDERATION—AGREEMENT TO EXTEND TIME FOR PAYMENT.—An agreement between the creditor and principal debtor, without the assent of the surety, to extend the time for the payment of a promissory note, due the second day of January, 1879, until after harvest, in consideration that the debtor would pay in wheat, is insufficient to extend the time of payment upon the note; such agreement is void for want of consideration to support it, for the reason that "after harvest," is an indefinite and uncertain time.

8	247
38	206
8	247
139	244
8	247
48	608

Statement of Facts.

SURETY—FAILURE TO PROCEED AGAINST PRINCIPAL.—When the debt becomes due, the request of the surety to sue the principal debtor, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety will not thereby be discharged.

APPEAL from Polk County.

This was an action on a promissory note, which is in the following words and figures, to wit:

"BUENA VISTA, February 20, 1878.

"On or before January 1, 1879, I promise to pay to W. R. Findley, or order, the sum of one hundred and nine dollars, with interest at one per cent. per month, from date until paid, for value received.

(Signed)

"H. TAYLOR HILL,
"M. SCRAFFORD."

Hill failed to answer, and was defaulted. Scrafford answered, admitting the execution of the note, but pleads in avoidance of his liability to pay the same, that he signed said note as surety only of Hill, and that respondent, at the time of the execution of said note, had full knowledge of that fact, although the word "surety" was not appended to said Scrafford's signature. Scrafford further shows in his amended answer, that on or about the second day of January, 1879, when Hill was solvent, he (Scrafford) notified and requested respondent to proceed to collect said note without delay, which respondent failed and neglected to do until October 6, 1879, when Hill was, and ever since has been, insolvent.

And for a further and separate defense Scrafford alleges that on or about the first day of March, 1879, respondent did, without the assent of this appellant, and against his protest, enter into an agreement with Hill, by the terms of which, said Hill should have an extension of time for the payment of said note until after the harvest of the year 1879, in consideration that said Hill should then pay the amount which should be due upon said note in wheat, when the same should be harvested by said Hill.

To the foregoing answer, respondent interposed a de-

Opinion of the Court—PRIM, J.

murrer, which was sustained, and judgment rendered against Scrafford for one hundred and thirty-two dollars and thirty-nine cents. From this judgment Scrafford appeals.

W. G. Piper, Bonham & Ramsey, for appellant.

R. S. Strahan, A. C. Sweet, and Daly & Gaby, for respondent.

By the Court, PRIM, J.:

The defense set up in the separate answer of the appellant is, that he signed the note upon which the action is based, as surety only of the defendant Hill, and that the respondent had full knowledge of that fact at the time said note was executed, although the word "surety" was not appended to his signature. That the respondent, without the assent of the appellant and against his protest, entered into an agreement with the defendant Hill, by the terms of which the said Hill should have an extension of time for the payment of the note until after the harvest of 1879, in consideration that said Hill should then pay the amount due upon the note in wheat, when the same should be harvested. If this was a valid agreement it is quite clear that it operated as a discharge of the appellant, for it is well settled that where time is given to the principal debtor without the assent of the surety, by a valid agreement which ties up the hands of the creditor, the surety is discharged. (*Bangs v. Strong*, 7 Hill, 250.)

But in this case we think the agreement for the extension of time was invalid, for the reason that the time to which the payment was extended was indefinite and uncertain, and for the lack of any consideration to support it. In *Miller v. Sterne*, 2 Penn. St. 286, it was held that "to discharge a surety by extension of the time of payment, there must be not only a sufficient consideration, but the time must be definite; hence an agreement to delay for an uncertain period, as until some time in the summer, will not discharge him." (Chitty on Bills, 412, 414; 3 Penn. St. 440.) The agreement to pay in wheat after harvest was equivalent to

Opinion of the Court—Prim, J.

saying that if the creditor would wait until after harvest he would pay the amount due on the note; hence there was no consideration to support the promise, and until "after harvest" was indefinite and uncertain.

The other defense set up in the separate answer of the appellant was, that on or about the second day of January, 1879, when the said Hill was solvent, he (Scrafford) notified and requested respondent to proceed to collect said note without delay, which he neglected to do until October 6, 1879, at which time said Hill was, and ever since has been, insolvent. The legislatures of many of the United States have by statute provided that the surety may by notice require the creditor to proceed against the principal, but our legislature having failed to adopt any such provision, the rule of the common law prevails in this state. Mr. Brandt, in his work on suretyship (sec. 208), says: "The great majority of cases on the subject hold, in the absence of any statutory provision, that if after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal he may himself pay the debt and immediately sue the principal." (*Jenkins v. Clarkson*, 7 Ohio, 72; *Carr v. Howard*, 8 Blackf. Ind. 190; *Davis v. Higgins*, 3 New Hamp. 231; *Nichols v. McDowell*, 14 B. Monroe, Ky. 15; *Frye v. Barker*, 4 Pick. 382; *Gage v. Mechanics' National Bank of Chicago*, 79 Ill. 62; 5 Nebraska, 484; 30 Mich. 143; 9 Cal. 557.)

There being no error appearing in the record, the judgment of the court below is affirmed.

Opinion of the Court—Boise, J.

ELISHA PULSE, APPELLANT, v. JAMES HAMER, RESPONDENT.

PAROL AGREEMENT, POSSESSION OF LAND UNDER.—Where one man agrees by parol with another to lease land for a term of years, to begin in the future, and agrees to put such parol contract in writing, and no consideration passes between the parties, either party may disregard the parol contract, and if the lessee go on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus obtained will not give him any rights under such parol agreement.

8	251
17	4
3*	573
8	251
45	504
8	251
48	203

APPEAL from Benton County.

This is an action to recover one thousand four hundred and eight dollars for the non-performance of a verbal contract for the leasing of certain premises. The terms of the contract are shown in the testimony recited in the opinion.

F. A. Chenoweth and F. M. Johnson, for appellant.

J. W. Rayburn, John Kelsay, and John Burnett, for respondent.

By the Court, Boise, J.:

To prove the contract as set up by the plaintiff in his complaint, the plaintiff offers himself as a witness and testifies as follows:

Question 2. "State the terms of the contract between you and the defendant, Mr. Hamer, in regard to the lease of his ranch mentioned and described in your complaint."

Answer. "In the spring of 1877, or rather in the summer, I had been informed that Mr. Hamer had a place to lease, and I went to see him some time the first of July—do not recollect the day and date. Mr. Rust informed me that Mr. Hamer had this place to lease, and stock, and I went to see him and told him what Mr. Rust told me, and he asked me what it was. I told him I understood he had his place and stock there to lease. He said he did. I asked him on what terms he would lease it, or a something to that amount. He said that he would furnish twenty or twenty-five cows and calves—cows that would come in; he would furnish me

Opinion of the Court—Boise, J.

eight three-year-old heifers that fall that would have calves, and furnish feed to feed them on in case they should need it; that he thought they would give milk enough to keep the calves that winter, and he would in the spring following furnish me with gentle cows, or brake cows enough to make out twenty or twenty-five head; that if he didn't have cows enough to make out the twenty-five head he thought the probabilities were in the spring he would have enough of two-year-old heifers to make out the twenty-five head, and I was to give him half of the increase of the cows—the calves; also I was to give him half of the grass that grew on the meadow; that the place, with the exception of the meadow, I was to have all I made upon it, and I told him I thought I would take the contract—and went back home—and told him that if my wife was willing to go in there I would drop him a little note to let him know, which I did. I got no answer till up in August some time, as well as I recollect—till him and Mr. Conner came into the field where I was harvesting. Mr. Hamer said that he had got my note—didn't deem it necessary to answer it, as he was coming up himself. We talked the matter over, with other things, and I asked Mr. Hamer there at that time to tell me how many cows and calves he would furnish me to keep on the shares in case I went down there. I told him the cattle was all that induced me to go down there, and he said he didn't know just exactly how many he could or would have, but he would furnish eight three-year-old heifers, that was spoken of before, and in the spring he would furnish me gentle cattle, or broke cattle, enough to make me out twenty or twenty-five head, he thought, anyhow, and if there was not enough to make out the contract heretofore spoken of, he would have some nice young two-year-old heifers that would come in in the spring that could or would make out the number that he had agreed to. Mr. Hamer then turned to me and said, we will have it down in writings. I told him that that was the proper and right way to do business, as well as I recollect. He then asked me when I could move on the place. I told him probably I could move on to it by the first of October, and on the tenth of October of that

Opinion of the Court—Boise, J.

year I moved on the said ranch that's named in the complaint. When I went there Mr. Hamer was not about, and no one on the place. I moved into the house, and in a day or two, or a few days, Mr. Hamer came. It appeared like everything was satisfactory. He went away, and in about one or two weeks after that, he came back to gather up his stock, with his son, or two sons, rather son and son-in-law, Mr. Dixon."

George Pulse, the son of the plaintiff, testifies:

"Question 2. Please state what, if anything, was said by Mr. Hamer about reducing the contract to writing. Give as near as you can the words used by both parties.

"Answer. He was to have it down in writings. He said then he didn't have time to draw them there.

"Question 3. Which one of the parties was it that you mean by he, Mr. Hamer or Mr. Pulse?

"Answer. Mr. Hamer."

This is the proof of the contract and the agreement to put it in writing offered by Mr. Pulse. The time of making the contract was in August, 1877. There is no proof of any other contract or conversation between the parties on this subject until after Mr. Pulse went on the farm of Mr. Hamer, on October 10, 1877. So the contract stood in parol with no act or word of either party in relation to putting it in writing until after Mr. Pulse went on the place. There is no evidence tending to show that Mr. Hamer requested Mr. Pulse to go on the farm under the parol contract made in August. The parol contract was void, and unless it was partly performed by one of the parties at the request of the other, it could never create any obligation. If before Mr. Pulse went on the farm he had requested Mr. Hamer to put this contract in writing and thereby make it legal and binding, and Mr. Hamer had refused to put it in writing, Mr. Pulse would have had no remedy, for the contract was simply void, and could be disregarded by either party. If Mr. Pulse, before he went on the farm, had requested Mr. Hamer to reduce the contract to writing, and Mr. Hamer had said to him, I am too busy now to do it, but you move on the farm and go on with your part of the

Points decided.

contract, and I will have it put in writing, and Mr. Pulse, in consideration of this promise, had gone on the place and made improvements and prepared to perform his part of the contract, it would present a different case. So, also, if after Mr. Pulse had gone on the place, Mr. Hamer had promised to put the contract in writing, and Mr. Pulse had in consideration thereof gone on and complied on his part with the contract. But in this case it does not appear from the testimony that Hamer requested Pulse to do any act under this contract, or even induced Pulse to incur any expense or loss in consideration that he would reduce this contract to writing.

We think that where one man agrees by parol to lease land to another for a term of years, to begin in the future, and agrees at the same time to put such parol contract in writing, and no consideration passes between the parties, either party may disregard the parol contract, and if the lessee go on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus obtained will not give him any rights under such parol contract.

This point being held for the respondent, all the other questions discussed by the counsel become immaterial, for there could be no specific performance of the contract.

The decree of the circuit court will be affirmed, with costs.

8	254
10	153
20	102
23*	364
8	254
36	282

F. R. HILL, APPELLANT, v. J. T. COOPER, RESPONDENT.

REMEDY—RENTS AND PROFITS RECEIVED TO THE USE OF ANOTHER.—Where one holds the possession of land as the trustee of another, and while so holding the possession receives to his own use the rents and profits which belong to his *cestui que trust*, the *cestui que trust* must resort to a suit in equity to recover such rents and profits of the trustee.

IDEML—RENTS AND PROFITS AND POSSESSION RECOVERED IN SAME ACTION.—

Where a *cestui que trust* prosecutes a suit in equity to compel his trustee to convey the legal title to him, he may in said suit recover of the trustee the rents and profits which the trustee has received to the use of the *cestui que trust* while the trustee was in possession of the land.

EJECTMENT—JUDGMENT CONCLUSIVE.—A judgment in ejectment is conclusive as to the legal title and right of possession as between the parties, and can not be collaterally impeached.

Statement of Facts.

APPEAL from Douglas County.

The complaint alleges, in substance, that plaintiff on and before June 3, 1873, was, and ever since has been, the owner and entitled to the possession of the premises described; that on the third of June, 1873, defendant wrongfully entered upon and took possession of said premises, and wrongfully detained the same until the sixteenth day of February, 1878, to plaintiff's damage, one thousand five hundred dollars; that there was a crop on said premises of the value of two hundred and fifty dollars; that defendant took the same and converted it to his own use, to plaintiff's damage, two hundred and fifty dollars; that the rents and profits of said premises during said time were worth one thousand two hundred and fifty dollars exclusive of said crop; and demands judgment for one thousand five hundred dollars.

The answer denies the allegations of the complaint; admits the rents and profits worth three hundred dollars; and alleges that defendant was the legal owner of said premises up to the sixteenth of February, 1878, and entitled to the possession, and the rents and profits; that before this action was commenced, plaintiff commenced suit against defendant for a conveyance of this land, alleging that this defendant was the legal owner; that decree was rendered in favor of plaintiff; that the rents and profits should have been claimed in said suit, and sets up the pleadings in said suit.

Also alleges, that on the twenty-second of June, 1873, in the circuit court for Douglas county, Oregon, in an action brought by this defendant against this plaintiff, judgment was rendered; that this defendant was the owner in fee simple of the premises mentioned in defendant's answer herein, and entitled to the possession thereof, setting up a copy of said judgment; that said judgment was appealed to the supreme court, and affirmed by said court; that under and by virtue of said judgment defendant entered upon and occupied said premises until the sixteenth of February, 1878, since which time he has not had possession of said premises, and asks judgment for costs and disbursements.

Statement of Facts.

The reply denies that the defendant was the owner in fee, or entitled to the possession of the said premises, or the rents or profits thereof.

This action was tried by the court without a jury, and judgment entered for defendant.

After the denials in the replication, as above stated, the plaintiff, by way of other and further replication, alleged as follows:

"Plaintiff avers that he did prosecute a suit to final determination against the defendant, but denies that it was only claimed in the complaint that plaintiff was merely the equitable owner of the premises described, but avers that said suit was prosecuted to recover the possession of said premises from the defendant, and to declare fraudulent and void a certain deed of April 8, 1872, from Sarah M. Stratton to the defendant, under which the defendant claimed to hold said real property, and that it was distinctly alleged in said complaint and finally determined in said suit; that on the twenty-second day of April, 1871, the plaintiff was the owner for a full valuable consideration and in possession of said land under and through a certain written deed or contract for the purchase of said land, executed by Riley E. Stratton and wife, Sarah M. Stratton, to James L. Patton, on the twentieth day of August, 1856; that thereafter, the defendant on the eighth day of April, 1872, with full knowledge of the equities of the plaintiff, by fraudulent representations and without consideration, obtained said quitclaim deed from Sarah M. Stratton to said premises. That said Sarah M. Stratton was at the time the widow, and was the sole heir of said R. E. Stratton.

"Plaintiff denies that the claim for rents and profits is an equitable demand or that any part of the claim therefor stated in the complaint was put in issue in said suit in equity or in any manner before the court in that suit, or determined therein, or that they should have been pleaded in said suit. Plaintiff avers that the question of the bare legal title to said premises was all that was before the court in the action at law prosecuted by the defendant against the plaintiff for the possession of said land, and was all that was described in

Statement of Facts.

said judgment. That it was upon the deed of April 8, 1872, from Sarah M. Stratton to the defendant that he obtained said judgment. That the plaintiff thereafter prosecuted to final judgment in the circuit court of the state of Oregon for Marion county, a suit against the defendant, in which it was alleged in the complaint and determined in said suit, that the plaintiff was the owner for a full valuable consideration, and in the possession of said premises under and through a written deed for the sale and conveyance of said premises, executed by R. E. Stratton and S. M. Stratton to one James I. Patton; which deed was defective in this, that by mistake of said parties they failed to have said deed signed by the subscribing witness, which it was intended by the parties at the time to have done.

"That the defendant, with a full knowledge of said facts, by fraud and without consideration obtained his deed of April 8, 1872, from Sarah M. Stratton, and that as against the defendant the deed of R. E. Stratton and Sarah M. Stratton, to James I. Patton, was and is valid, and of binding force. That the defendant's said deed was fair upon its face, and it was the only evidence of title upon which the defendant recovered upon his action at law, and is the only evidence of title that the defendant ever claimed to said premises, and his insisting upon and claiming said title was and is a fraud, and the defendant ought not to be allowed to plead that he was entitled to any rents or profits by reason of said fraudulent deed, or by reason of any judgment through said deed."

That all the above reply, beginning with the words "Plaintiff avers," was stricken out by the court on motion of respondent's attorneys, on the ground that the same was "sham, frivolous, and redundant."

Thereafter the court found that the respondent was entitled to judgment for his costs and disbursements.

A. C. Gibbs, E. W. Bingham, and Herman & Ball, for appellant.

W. R. Willis, for respondent.

Opinion of the Court—Boise, J.

By the Court, BOISE, J.:

From this statement of the case, it appears that during the time for which the plaintiff claims the rents and profits of the land and damages, the defendant was in possession of the premises as the legal owner of the title, which had been adjudged to him by a judgment in an action by the defendant herein against the plaintiff; that afterwards, on the said sixteenth day of February, 1878, said plaintiff herein obtained a decree against the defendant, declaring plaintiff to be the owner in equity, and directing a conveyance of the title to the plaintiff by the defendant. That decree found that the defendant was the trustee of said title for the plaintiff, and if the said trustee had received the rents and profits of the land while he held it in trust, he could have been called on to account for the same in that suit in equity. (2 Story's Eq. sec. 794, 795; 1 Perry on Trusts, sec. 17; *Starr v. Stark*, decided by this court April 22, 1879.) Such was certainly the proper and most convenient remedy for the determination of the damages, and value of the rents and profits received by the trustee, which were incidental to the suit by the plaintiff to settle his rights to the title to the land.

It is claimed by the plaintiff that although he might have obtained the rents, profits, and damages for taking the growing crop in said suit in equity, he may now maintain this action. We think that the defendant, being the legal owner of the land at the time he received these rents and profits, had then the legal right to receive them. And as he was then the trustee of the plaintiff as to the title to the land, he received the rents and profits for the use of plaintiff as his (plaintiff's) trustee, and was liable to account to him for them. And as no account has been taken and stated of the amount of these rents and profits, it is still an open trust. (Perry on Trusts, sec. 843.) And no action at law can be maintained against a trustee by his *cestui que trust* before a final account is settled and a balance struck.

It is claimed by the plaintiff that an action can be maintained in this case because the entry on the land was

Points decided.

wrongful. To make the entry wrongful, it must have been unlawful. The judgment in favor of the defendant in the action for the possession of the land conclusively proves that his entry on the land was lawful, and he can not be treated as a trespasser. And the decree in the case in equity determines that he was the trustee of the legal title, and we do not think that we can now go into the question as to the manner in which he obtained the legal title, or the evidence by which he proved it, for his right thereto is conclusively established by the judgment which still stands unimpeached by the decree in *Starr v. Stark*, above cited.

That part of the replication which was stricken out seeks to put in issue the validity of the deed by which he proved his title in that case. This can not now be done, for it would be opening that case and trying it over again between the same parties. So we think there was no error in the ruling of the court in striking out this part of the replication.

It will not be necessary to go further into the questions discussed in this case, for, as we hold that the defendant was the trustee of the plaintiff, while he is charged with having held the premises, the plaintiff can not recover damages for withholding them in an action at law.

The judgment of the circuit court will be affirmed.

JAMES R. BAYLEY, RESPONDENT, *v.* MARGARET A. McCOY, ADMINISTRATRIX, ETC., APPELLANT.

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ESTOPPEL—DEED, RECITALS, ADMISSIONS, OR COVENANTS IN.—Where it distinctly appears in a deed of conveyance of real estate, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive reciprocally a certain estate, they will be estopped from denying the operation of the deed according to this intent.

APPEAL from Benton County. The facts are stated in the opinion.

F. A. Chenoweth and F. M. Johnson, for appellant.

John Burnett and John Kelsay, for respondent.

Opinion of the Court—PRIM, J.

By the Court, PRIM, J.:

This was an action to recover damages for an alleged breach of certain covenants in a deed. On May 23, 1870, John H. Kendall and wife, for a valuable consideration, sold a certain lot in the town of Corvallis, Benton county, Oregon, to James R. Bayley, and then and there made, executed, and delivered to him their deed for the same, as follows: "That the party of the first part, for and in consideration of the sum of eight hundred dollars to them in hand paid, * * * have bargained, sold, and conveyed, unto the said party of the second part, the following described premises, to wit: All of their right, title, and interest in and to lot number one in block number eleven, in the city of Corvallis, Benton county, and state of Oregon, to have and to hold the said premises, with their appurtenances, unto the said James R. Bayley, his heirs and assigns forever. And the said John H. Kendall does hereby covenant to and with the said James R. Bayley, his heirs and assigns, that I am the owner in fee simple of said premises; that they are free from all incumbrances, and that I will warrant and defend the same from all lawful claims whatsoever." That at the time when said deed was made, the said Kendall was not the owner of any portion of said lot except the south half thereof, and neither he nor his heirs have warranted or defended the said premises to the said Bayley, but on the contrary, at the time when said deed was made and delivered to him, the north half of said lot was seised and possessed by the Corvallis Lodge, No. 14, Ancient Free and Accepted Masons, of Benton county, Oregon, by virtue of an older and better title. Said Kendall having died prior to the commencement of this action intestate, it was brought against appellant as the administratrix of his estate.

The answer of appellant, after denying certain allegations of the complaint, sets up as a separate defense: That at the time when said Kendall made the deed mentioned in the complaint in this cause, he did not sell or convey to the respondent all of said lot number one in block number eleven, but that he sold only the right, title, and interest he then had in said lot, which was the south half of said lot;

Opinion of the Court--Prim, J.

that at the time of making said deed, the said Kendall was the owner in fee simple of the south half of said lot. That said south half was all that said Kendall attempted to convey to respondent by said deed, and was all that had been bargained for by him at the time, and was all that said covenant of title related to, and was so understood at the time of said purchase. A demurrer was interposed to this part of the answer, which was sustained by the court, and judgment rendered against the appellant, from which he appeals. The order and judgment of the court sustaining the demurrer to this portion of the answer, is the principal and main ground of error complained of here.

It was claimed on the argument, that the deed only purports to convey such right, title, and interest as the grantor then had in said lot one, and no more, and the covenants, although more general, should be held to have reference only to such right and title as the grantor then had in said lot, whatever that might be. This doctrine appears to be maintained by the decisions of Massachusetts and one or two other states; but the modern decisions of the most of the state courts, and of the supreme court of the United States, maintain a contrary doctrine. They hold that "whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance." (*Van Rensselaer v. Kearney*, 11 How. 325; *Fairbanks v. Williamson*, 7 Greenl. 96; *Jackson ex dem. Munroe v. Parkhurst*, 9 Wend. 209.) In *Taggart v. Risley*, 4 Or. 235, this court adopted that doctrine, and that case we think is decisive of this one.

Mr. Rawle, in his work on covenants, in commenting on this subject, says: "When, however, it has distinctly ap-

Opinion of Kelly, C. J., dissenting.

peared in such conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive reciprocally a certain estate, they have been held to be estopped from denying the operation of the deed, according to this intent." (Rawle on Covenants, 388; *Jackson v. Waldron*, 8 Wend. 178.) By reference to the deed, it will be seen that Kendall and wife "bargained, sold, and conveyed * * * the following described premises, to wit: All their right, title, and interest in and to lot number one in block number eleven." And there it is asserted by way of covenant, "that he was owner in fee simple of said premises, and that he would warrant and defend the same from any lawful claims whatsoever." The word "premises" evidently refers to the whole of lot number one, described in the deed, and not to one half of it, as is contended by the appellant. We think that the appellant is estopped by the recitals and covenants of this deed from averring and proving the matters sought to be set forth in the answer as a defense to this action.

There being no error in the record, the judgment of the court below is affirmed.

Mr. Chief Justice KELLY, dissenting:

I do not concur in the opinion of the court, and will briefly give the reasons for my dissent. It is conceded that the deed of J. H. Kendall and wife to J. R. Bayley conveyed to the latter only the right, title, and interest which they had in lot one in block eleven, and not the lot itself; but the court holds that the covenant of Kendall and wife that they were the owners in fee simple of the premises, is a covenant that they were the owners of the entire lot. I do not so understand it. The deed conveyed only the interest which the grantors then had in the lot. The *habendum* limits the estate then granted to the interest which they then had in the premises, and the warranty is that they were the owners of the premises. I do not consider that the word premises, as here expressed, means the entire lot, but only the interest which the grantors then sold. If they had covenanted that they were the owners of lot number one, then there

Opinion of the Court—Kelly, C. J.

would have been no doubt of their liability in this action. I think this position is supported by the decision of the supreme court of Massachusetts in the case of *Sumner v. Williams*, 8 Mass. 162, and is not in conflict with the case of *Taggart v. Risley*, decided by this court in 4 Or. 235.

THE CANYONVILLE AND GALESVILLE ROAD COMPANY, RESPONDENTS, *v. H. W. STEPHENSON ET AL., APPELLANTS.*

TOLL ROAD—ROAD CORPORATION MAY USE PUBLIC HIGHWAY.—A corporation organized under the general incorporation law of this state to construct a plank or clay road, is authorized by law to appropriate and use any part of a public road which may be necessary and convenient in the location of such plank or clay road; but the corporation does not thereby acquire the right to exclude another corporation subsequently formed for the same purpose, from appropriating and using the same part of the public road when it is necessary and convenient in the location of its road.

FRANCHISE—GRANT STRICTLY CONSTRUED.—The grant of a franchise is to be strictly construed against the grantee, and nothing passes by implication. It is not exclusive unless expressly made so by the grant itself.

APPEAL from Douglas County. The facts are stated in the opinion.

James F. Gazley and Hermann & Ball, for appellant.

W. R. Willis and R. S. Strahan, for respondents.

By the Court, KELLY, C. J.:

This was an action brought in the county court by respondent to recover damages from appellants for placing a toll-gate across a road which it claimed as belonging to itself. The appellants denied that it was the property of respondent, and alleged that it belonged to the Douglas county road company, a corporation formed for the purpose of locating and constructing a road through the canyon in the southern part of Douglas county, on substantially the same line as the road of respondent. They also allege in their answer that in erecting the toll-gate they acted as the officers and employes of the Douglas county road company

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Opinion of the Court—Kelly, C. J.

and in no other capacity. A judgment was rendered in favor of respondent, and the appellants took the case to the circuit court upon an appeal.

By agreement of the parties the action was tried by the court without a jury, and as matters of fact the court found that as early as 1853 Jesse Applegate, under the superintendence of Major Alvord, U. S. A., surveyed and laid out a military road through what is known as the canyon in the southern part of Douglas county. In 1858 it was changed in some respects and worked under the superintendence of Col. Joseph Hooker, acting under the authority of the United States government. Since that time the travel has been on the Hooker road. Before the incorporation of the respondent a corporation had been formed known as the canyon road company, to construct and maintain a road through the canyon. It was worked by that corporation, and in some places varies a short distance from the Hooker road. The canyon road company had for some years kept a toll-gate and collected tolls under an agreement with the county court of Douglas county. But by a judgment of the circuit court for Douglas county it was dissolved at the October term, 1873. Before the dissolution of the canyon road company the respondent was incorporated for the purpose of locating, constructing, and maintaining a road through the canyon. Prior to the first of October, 1873, the respondent surveyed and located its road the entire distance through the canyon, upon the line and route worked and occupied by the canyon road company.

On the twentieth day of December, 1873 (as appears by the pleadings), the Douglas County Road Company was incorporated for the purpose of locating and constructing a road through the said canyon; and at the April term, 1874, of the county court of Douglas county, that corporation desiring to appropriate a part of the public road running through the canyon, petitioned the county court to enter into an agreement upon the extent, terms, and conditions on which the same might be used by the corporation. The county court then and there entered into an agreement with the Douglas County Road Company upon the terms and

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conditions on which it could appropriate and use the public road, and authorized that corporation to establish a toll gate and collect certain specified tolls from the traveling public in consideration of keeping the same in good repair. Afterwards, on the eighth day of February, 1875, the respondent made an agreement with the county court of Douglas county upon the extent, terms, and conditions on which the said public highway might be appropriated and used by it.

The court also found as a matter of fact that the Douglas County Road Company did not, before entering into the agreement with the county court, survey, locate, or adopt any line or definite location of its road, except that it surveyed and located a short route outside of the limits of the county road, about one half a mile in length and about five miles south of the toll gate, kept and maintained by the appellants as officers of the Douglas County Road Company and for its benefit.

Under this state of facts it is insisted by the respondent that inasmuch as it first surveyed and located its road through the canyon, neither the Douglas County Road Company nor any other corporation had a right to appropriate or use that part of the public road. We do not so construe the sections of the statute authorizing a corporation to make a public highway part of its corporate road. At the last term of this court, in the case of the *Douglas County Road Company v. The Canyonville and Galesville Road Company*, the court said: "The appellant (C. & G. R. Co.) had a right under the law in relation to corporations to enter upon any land between the *termini* of its road for the purpose of examining, surveying, and locating the line of it and to appropriate a strip of land not exceeding sixty feet in width for its road, where the land belonged to private individuals. And it had also the right, in case it could not agree with the owners thereof as to the compensation to be paid therefor, to maintain an action against such owners to have the value assessed and the land condemned and appropriated to its own exclusive use. And we think that if the appellant entered upon, surveyed, and selected any land

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for its road which belonged to private persons, it had the exclusive right from the time of such survey and selection to appropriate the same, and that the respondent could not in any way interfere with such right, nor construct its road upon any such lands. But it does not follow that by surveying a public highway and making it a part of its corporate road the appellant thereby acquired the right to appropriate the same to its exclusive benefit, nor does it follow that the respondent (D. C. R. Co.) had no right to use such public road, or a part of its corporate road, in the same manner as appellant. The statute contemplates that in the construction of a road by a corporation it may sometimes be necessary or convenient to use part of a highway, as where it passes through a defile or canyon, or where it is difficult to construct a road alongside of the public highway, and in such cases it is provided that the public road, or so much as may be necessary and convenient, may be used, or in the words of the statute, "may be appropriated by the corporation." The word appropriated is not, however, to be here understood in the same sense as in the appropriation of lands belonging to private individuals where the corporation becomes entitled to the property. By the appropriation of part of a highway the corporation acquires no right except to use the public road in common with all others traveling upon it, unless it makes an agreement with the county court as provided in section 26, above quoted. This section of the statute does not provide that any part of a public road "may be appropriated or used and occupied" by only one corporation, nor that the first one which so uses and occupies it, or which first surveys it, shall have exclusive privileges over any other corporation which may subsequently be organized. And we think it would be unwise and impolitic to construe the statute so as to confer exclusive benefits and privileges upon one corporation, and exclude all other from the right to compete for the public travel on the public highways."

It is claimed by the respondent here, that because it surveyed and located the line of its road along the public highway leading through the canyon before the Douglas County

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Road Company was incorporated, it, and it alone, had the right to appropriate the public road to its own use, to the exclusion of every other corporation. We do not so regard it. It is very certain that section thirty-six of the act relating to corporations (see Code, p. 530) confers no such exclusive privileges of this kind, either in express words, or even by implication. The great case of *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, has generally been relied on as a clear, if not binding authority in support of the doctrine that a grant of a franchise is to be specially construed against the grantee, and that it is not exclusive unless expressly made so by the grant itself. (*Bartram v. Central Turnpike*, 25 Cal. 283; *Fall v. Sutter County*, 21 Cal. 237; *Indian Canyon Road Co. v. Robinson*, 13 Cal. 519; *Bush v. Peru Bridge Co.*, 3 Indiana, 21.

If the twenty-sixth section of the act referred to had provided that a corporation formed to construct a road might appropriate so much of a public highway as might be necessary and convenient in the location and construction of its road, and have the exclusive right to such appropriation and use, then the position taken by the respondent would undoubtedly be correct. As it is, under the existing law, both of the rival corporations have the same and an equal right to use and appropriate the portion of the public road leading through the canyon, as parts of their respective corporate roads. We are satisfied that it never was the intention of the legislative assembly to allow any corporation to obtain a complete monopoly of the trade and travel of the country by excluding rival corporations from the use of public highways where they lead through defiles and canyons, and the courts ought not to put such a construction on the act unless it is clearly susceptible of no other interpretation. When congress, by the act of March 3, 1875, granted the right of way through the public lands to railroad companies, it was deemed of so much importance to the people at large that free competition should exist for the trade and travel of the country, that it was then enacted: "That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes

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through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile for the purposes of its road, in common with the road first located."

Our own law, which authorizes a corporation to appropriate to its own use a part of any public road, when it is necessary or convenient in the location of its corporate road, should be construed in the same spirit as the act of congress just referred to. But it is insisted by the respondent that the Douglas County Road Company did not, before making the agreement with the county court at the April term, 1874, survey, locate, or adopt any line, route, or definite location of its road, except that it surveyed and located a short route outside of the limits of the county road, the northern terminus of which was about five miles south of the toll gate in controversy, and therefore it had no right to appropriate or use that part of the public highway as a portion of its corporate road, nor erect the toll gate in controversy, across it. We do not consider it was necessary for that corporation to survey and locate any part of the line of its contemplated road between the *termini* thereof, except so much of it as was not on the county road. In other words, we hold that the Douglas County Road Company was not required by law to survey and locate that part of the public highway which it desired to appropriate to its own use. It had already been surveyed and marked out as a county road, and required no further designation to make it definite and certain. It could as well agree with the county court without as with a survey, as to the part of the public road to be appropriated by the corporation, and when the agreement was made between the county court and the Douglas County Road Company, the latter had a right to erect the toll gate upon any part of the public road so appropriated, and to use the same according to the terms and stipulations contained in the contract.

Both of these rival corporations having a right to appropriate and use the part of the public highway running through the canyon as a portion of their respective corporate roads, the county court of Douglas county was author-

Opinion of Boise, J., dissenting.

ized by law to contract with either of them to keep the public road in repair and to agree on the terms and conditions upon which the same might be appropriated and used. But it was under no obligation to contract with either corporation. It, however, did enter into an agreement in writing with the Douglas County Road Company, at the April term, 1874, as the court below has found. The validity of this contract was determined by the supreme court, except as to the entry thereof upon the journal of the county court, which entry was enforced through the mandatory power of this court. (*Road Company v. Douglas County*, 5 Or. 406.) This agreement was and is valid and binding as well upon the county court as upon the corporation with which it was made. Neither has a right to violate it, and neither can revoke it without the consent of the other party to it.

In pursuance of this contract the Douglas County Road Company was authorized to erect the toll gate which is the subject of this litigation, and to collect tolls thereat. The appellants were acting in the capacity of officers and employes of the corporation in doing the acts complained of by the respondent, and were justified in their acts.

Upon the findings of fact in the circuit court the judgment of that court is reversed, and it is instructed to enter a judgment in favor of the appellants, with costs and disbursements.

Mr. Justice Boise, dissenting:

I do not agree with the opinion expressed by the chief justice: 1. For the reason that the Douglas County Road Company never located any road over the county road through the canyon. That is to say, that the location by survey of one half a mile of road in the canyon some miles from where the gate is kept, is not a location of the road in question. To entitle a corporation to take and use a county road as claimed in this case, the part of the county road so taken must be embraced in the line of the corporate road. 2. On the other point, that the Canyonville and Galesville Road Company, having located their road first, thereby acquired the first

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right to appropriate this road, I fully expressed my views in my dissenting opinion filed in the case of the *Douglas County Road Company v. The Canyonville and Galesville Road Company*, and it will not be necessary to repeat them here.

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J. B. TICHENOR, RESPONDENT, v. CLIFFORD COGINS, APPELLANT.

ASSIGNMENT ACT OF 1878—ATTACHMENT DISCHARGED—INTERPLEADER—

Where the holder of a promissory note commenced an action on it against the maker, and attached his property, and afterwards the defendant assigned his property under the provisions of the assignment law of October 18, 1878, for the benefit of all his creditors, and the assignee, before judgment was obtained, filed a motion in the court for leave to interplead, in order to have the attachment dissolved, and the court denied such motion: *Held*, That under the code, the assignee was not authorized to interplead, and that it was not error in the court to deny the motion. *Held, further*, That in such case the attachment was discharged at the date of the assignment, by force of the assignment itself.

APPEAL from Curry County.

On the eighteenth day of November, 1878, the respondent commenced an action against Jason Springer & Co., on a promissory note executed and delivered by them, and made payable to the order of A. Crawford & Co., for one thousand one hundred and fifty dollars, which was duly indorsed and transferred to the respondent. Proceedings in attachment against the property of Jason Springer & Co. were commenced the same day, and on the twenty-first day of November, a large amount of real and personal property belonging to them was attached by the sheriff of Curry county, in which the action was pending. The defendants in the attachment being insolvent, made an assignment to the appellant, Clifford Coggins, of the greater portion of the property belonging to them which had been attached by the sheriff. The assignment was made for the benefit of all the creditors of the assignors, in pursuance of the act of the legislative assembly, entitled "An act to secure creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," approved October

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18, 1878. It was recorded in Multnomah county, where the business in respect of which the assignment was made was carried on, March 1, and in Curry county, on March 22, 1879.

On June 2, after default, but before judgment was entered, Clifford Coggins, the appellant, filed a motion for leave to interplead in the action, for the purpose of moving to dissolve the attachment, for the reasons: 1. That the defendants in the attachment had made an assignment of their property for the benefit of all their creditors, etc. 2. That the affidavit for the attachment did not set forth sufficient grounds for an attachment, etc.

The court overruled the motion and refused to allow the appellant to interplead, and afterwards gave the respondent leave to amend the affidavit for attachment, etc. On the fourth day of June, 1879, judgment for want of an answer was rendered against the defendant, Jason Springer.

E. D. Shattuck, and Northup & Gilbert, for appellant.

E. W. McGraw, for respondent.

By the Court, KELLY, C. J.:

The first assignment of error by the appellant is: That the court erred in denying the motion of Clifford Coggins, assignee of the defendants, Jason Springer and others, under the act of the legislature, entitled "An act to secure creditors a just division of the estate of debtors who convey to assignees for the benefit of creditors," approved October 18, 1878, * * * for leave to interplead, and to move the court to dissolve the attachment issued in said cause on the nineteenth day of November, 1878. Section 40, page 112, of the civil code, provides that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court shall cause them to be brought in." Evidently this section of the code requires the issues between the original parties to an action to be determined as

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they are presented for adjudication, unless by so doing the rights of others would thereby be prejudiced, and it is only when they can not be so determined that other parties can be brought in by the court. The object is to prevent, as much as possible, the multiplicity of issues to be tried in the same action, when it can be avoided without injury to others.

So, also, the right of persons, not parties to the action, to intervene, is circumscribed within very narrow limits, being confined to cases in which a bill of interpleader would have been permitted, under the former practice, to accomplish the same end, and, under our code, can only be exercised in actions for the recovery of specific real or personal property. While admitting that there is no special provision which would authorize the intervention of the appellant in this action, his counsel claim that under section 911, p. 289, of the civil code, the court in the exercise of its jurisdiction in relation to assignment for the benefit of creditors had authority, and ought to have allowed him to interplead in behalf of the creditors whose interests he represents. That section authorizes a court to use all the means necessary to carry into effect the jurisdiction conferred upon it by law. And where the mode of proceeding is not specifically pointed out, the court may adopt any suitable means conformable to the spirit of the code to accomplish that end. We do not, however, consider that the court was called upon to allow the appellant to interplead, in order to have the attachments dissolved, because none of his rights were prejudiced by the denial of the motion for permission to interplead. As the appellant was not a party to the action, nor allowed by the court to intervene in the proceedings to dissolve the attachment, he has lost none of his rights to the property which was attached by the respondent. Section 13 of the act approved October 18, 1878, empowers him to "sue for and recover, in the name of the assignee, everything belonging or appertaining to said estate." He can assert and maintain all his rights to the property attached, in a separate action or suit against all persons claiming it under the attachment adversely to him.

Points decided.

There is another reason why we consider there was no error of the court in refusing to allow the appellant to intervene for the purpose of filing a motion to dissolve the attachment. If the assignment of the property by the defendants to the appellant was legally made in accordance with the requirements of the act of October, 1878, no action or decision of the court was necessary to dissolve it, for it had already been discharged by operation of the assignment itself. The first section of the act declares that "such assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment." As the assignment in this case was made after the date of the attachment, and before judgment was taken, it discharged the attachment *proprio vigore*, by its own force, and it could not be revived by any subsequent action of the court. Interpleading, therefore, on part of the assignee, in order to protect the rights of the creditors, could have amounted to nothing and accomplished nothing.

We do not say whether the assignment was valid or invalid. We have not examined it, and that question is not before us. If the assignee shall hereafter bring an action to recover the property attached, or a suit to enjoin the sale of it, that matter will then properly come before the court for adjudication, and all parties interested in the controversy can be heard.

Having taken this view of the case, it becomes unimportant to examine any other assignment of error, and the decision of the court below is affirmed.

B. H. LEWIS AND H. P. LEWIS, RESPONDENTS, v. CHAS. McCCLURE AND CHANCEY AIKEN, APPELLANTS.

8	273
48	336
648	337

CUSTOM—PROOF OF, WHEN REQUIRED.—Where a plaintiff alleges a right to appropriate water under a local custom, and such allegation is denied, the plaintiff must prove such custom and a compliance therewith. The court does not take judicial knowledge of local customs concerning water rights. To claim and hold water appropriated under a local custom, such as is recognized by the act of congress of the twenty-sixth day of

Opinion of the Court—Boise, J.

July, 1866, the claimant must allege and prove a custom such as is named in said act.

APPEAL from Union County. The facts are stated in the opinion.

L. O. Sterns, J. J. Balleray, and Knight & Lord, for appellants.

Baker & Eakin, and J. A. Stratton, for respondents.

By the Court, BOISE, J.:

From the pleadings in this case it appears that the plaintiffs (respondents) claim to have appropriated the water of a small stream flowing through their land for the purpose of using the water for domestic and stock purposes and for irrigation. They claim the land as pre-emptors on unsurveyed lands. The defendants (appellants) claim also as pre-emptors, and are on the land below the plaintiffs, through which the stream of water in question flows, in its natural channel. For aught that appears, both parties are lawfully possessed of the lands they claim, and would possess the rights of riparian owners as defined and limited by the common law, unless these rights have been modified by the local custom of the country, so as to give the plaintiffs the right to take this water under the customs and decisions recognized and legalized by the act of congress of the twenty-sixth of July, 1866, which provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." (United States Statutes, p. 432, sec. 2339.) In order that the plaintiffs may claim all this water as against the riparian proprietor below them, they must show that they first took the water according to the acknowledged local customs, etc. This they have alleged, and this allegation is denied by the defendants. There is some objection to the answer in this

Opinion of the Court—Boise, J.

behalf as referring the denial to the wrong count of the complaint; but we think the answer, though it does not name specially the ninth count of the complaint in which the custom is alleged, does contain a denial of the custom with sufficient certainty to put that allegation at issue.

The allegation of the custom in the complaint is, "that the appropriation and use of said water, as aforesaid, was at the date of said appropriation, and now is recognized and acknowledged by the local laws and customs of the country where appropriated, and by the decisions of the courts." The denial in the answer, after denying the eighth count, proceeds: "Or that the appropriation of and use of said water by the plaintiffs, in the manner in said count set forth, was, at the date of said appropriation, or that it now is recognized or acknowledged by the local laws or customs of the country where appropriated, or by the decisions of courts set forth, as by plaintiffs alleged. But, on the contrary, said alleged appropriation of said water was and is in conflict with said customs, laws, and decisions of courts." The words, "in the manner in said count set forth," are claimed to refer to the eighth count. But the eighth count contains no allegation as to custom, and this denial could not refer to it, but it does apply to, and deny in terms, the ninth count. So we think the complaint and answer taken together show what was intended to be denied, and what count was referred to, and there is no possibility of the plaintiffs being misled by the answer. And plaintiffs were by this answer put to the necessity of proving the custom which they had alleged, for of this the court could not take judicial knowledge.

We have examined the testimony as exhibited in the briefs, and find no evidence whatever tending to prove that such a custom existed in the county where this water was taken, and the plaintiffs must fail for want of proof, and the bill must be dismissed.

Opinion of the Court—Kelly, C. J.

8 276
37 421

**MARY LEONARD, APPELLANT, *v.* WILLIAM GRANT,
ADMINISTRATOR OF THE ESTATE OF D. G. LEONARD, RE-
SPONDENT.**

DOWER—ADMINISTRATOR—POSSESSION OF ESTATE.—A widow is not entitled, immediately on the death of her husband, to receive one third of the rents and profits of the lands of which he was the owner and died seized, in right of her dower interest therein, but the executor or administrator of the estate is entitled to the possession and control of the same, and to receive the rents and profits thereof, to be applied to the satisfaction of claims against the estate.

APPEAL from Wasco County.

D. G. Leonard died intestate on the sixteenth day of January, 1878, leaving the appellant his widow. At the time of his death, he was seised in fee of certain real estate in Wasco county, upon which was a bridge across John Day river. He was then largely indebted, and on the thirteenth of April, 1878, the respondent was appointed administrator of his estate. As such administrator, he sold the real estate for the purpose of paying the debts against it, and the sale was made, subject to the widow's right of dower. Between the time he was appointed administrator and the time when he sold the real estate, he received as such administrator the sum of one thousand eight hundred and seventy-three dollars, mainly from the crop of grain which the decedent had sown, and tolls received from persons passing over the bridge. The amount so received was applied by the respondent to the payment of the debts due by the decedent. The appellant now claims that one third of this sum of one thousand eight hundred and seventy-three dollars, to wit, six hundred and twenty-four dollars, belongs to her in right of her dower interest in the said real estate, and this action was brought to recover that amount.

John Catlin, for appellant.

N. H. Gates, for respondent.

By the Court, *KELLY, C. J.:*

The appellant claims that in right of her dower interest

Opinion of the Court—Kelly, C. J.

in the lands of the deceased husband, she is entitled to the one third of the rents and profits thereof, which the respondent received from the time he became administrator until he sold the lands to pay the debts of the decedent. The respondent contests her claim, and alleges that he was entitled to receive such rents and profits in the due course of administration. The first section of the act of January 16, 1854, declares "that the widow of every deceased person shall be entitled to dower, or the use during her natural life, of one third part of all the lands whereof her husband was seised of an estate of inheritance at any time during her marriage, unless she is lawfully barred thereof." In an action against the heirs of her husband to recover her dower, if the same has been withheld from her, she is entitled to recover damages for withholding such dower. "Such damage shall be one third of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated, in a suit against the heirs of her husband, from the time of his death," etc. (Civil Code, sec. 25, p. 587.)

The act of October 11, 1862, provides that "the executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof, until the administration is completed, or the same is surrendered to the heirs or devisees by order of the court or judge thereof," etc. (Code, sec. 1088, p. 324.) The real property of the deceased is the property of those to whom it decends by law, or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as by this chapter provided." (Code, sec. 1160, p. 337.)

The counsel for appellant admits that the respondent was entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof, to be applied to the satisfaction of claims against the estate. But he contends that this does not include the widow's estate of dower in the lands of which her husband died seised; and that she was entitled

Points decided.

to the one third of the rents and profits thereof, immediately after his death, in right of her dower interest therein. This is not our construction of the law. Before the assignment of dower the widow has no estate in the lands of her husband. Until that time her right is strictly a claim, a mere chose in action. She is not seised of any part of the lands on the death of her husband, by any right of dower until it is assigned to her. (*Lawrence v. Miller*, 2 Comstock, 245; 1 Washburne on Real Property, 222, 251, 254; Greenleaf's Cruise, vol. 1, tit. Dower, c. 3 and note.) As there was no assignment of dower to the appellant, she had no estate whatever in the lands of which her husband died seised, and was not entitled to the possession of any part of it; and necessarily, therefore, the respondent became entitled to the possession and control of all the lands which the decedent owned at and immediately preceding his death. And he was required by law to apply the rents and profits thereof to the payment of claims against the estate. The act of October 11, 1862, sections 1094 to 1097, p. 325 of the code, makes provision for the support of the widow and minor children, if any, of the deceased, out of the property which belongs to his estate, and which comes to the possession of the executor or administrator. We are of opinion that this provision to be supported out of the estate of the decedent, was intended by the legislature to be in lieu of dower to the widow, and that she is not entitled to an assignment of her dower in the lands of her husband, until the administration is completed, or the same is surrendered to the heirs or devisees, by order of the probate court.

The judgment of the circuit court is therefore affirmed.

8	278
19	104
24	245
25*	662
8	278
25	566
37*	58
8	278
35	281
8	278
36	36
8	278
37	586
8	278

DAVID COFFMAN, RESPONDENT, *v.* THOMAS ROBINS, APPELLANT.

WATER RIGHTS—PAROL AGREEMENT.—Where a stream of water which passes through the lands of different persons is divided by them by a parol agreement, and each party repairs ditches, and receives and cares for his share of such water, such agreement will be enforced in a court of equity. **IDEM—NOTICE.**—Where one buys land, he is presumed to buy with notice of the water rights in use on the premisea.

Statement of Facts.

IDEM—LOWER OWNER ON STREAM.—When a stream of water flows through the lands of different persons in a well-defined channel, the lower owner on the stream has a right to have the water flow through his lands undiminished, except so far as the upper riparian owner may use the same for the use of his premises for domestic use, stock, and reasonable irrigation.

APPEAL from Umatilla County.

This is a suit by the respondent to enjoin the appellant from diverting any part of a certain stream of water from respondent's premises, and from preventing any more than one third of such flowing upon the respondent's premises at the southeast corner of his farm, and for damages.

The respondent alleges that two springs rise on the lands of appellant, the waters of which unite and form a stream which runs through the lands of Daniel Simmons to a point distant about one hundred yards south of the north boundary of Simmons' farm, at which point the waters divide and form two separate channels, both of which channels run on to the premises of the appellant Robbins, in the said north-west quarter of section 6, near the south-west corner of said land, and from there, when unmolested, passed on to the north-east quarter of section one, of respondent's land, in several different channels, one of which channels passed on to said land at a distance of about two rods from the south-east corner of his farm, which channel carried about one quarter of the water running from said springs. The second and principal channel flowing from said springs passed on to respondent's land at a distance of about twenty-six rods from his south-east corner, which channel carried about one half of the water flowing from said springs; and two smaller channels formed by the waters of said springs passed on to his land near the center of his east line, which said two last-mentioned channels carried about one quarter of the water flowing from said springs; and that all the water flowing from said springs passed on to respondent's land in said four channels, and from there flowed in a northerly direction in several different channels, until they reached the west half of his home farm, where they again united and formed one main channel, which passed off from his said home

Statement of Facts.

farm on the west side thereof, from whence it ran on to some railroad land which is in the possession of respondent, and from thence to some land owned by one James M. Leezer. That said waters, before any ditches were dug, caused about sixty acres of respondent's land and about forty acres of appellant's land to be swampy, and to be grown over with tules.

That during the year 1864, two ditches were cut, distant about five feet apart in a north and south direction, on the line dividing the home farm of respondent from the northwest quarter, section six, of appellant, which said last-described land was then the property of one John McCoy, and that a wall of sod and dirt was built between said ditches, said wall being about five feet thick at the bottom, about four and a half feet high, and running up tapering to about the width of two feet at the top, and that said ditches were cut and wall erected for the purpose of forming a fence between the premises of respondent and the said John McCoy. That said wall prevented the water from said springs from flowing on to respondent's land in any of its natural channels, but that by mutual consent and agreement between himself and John McCoy, and other persons who afterwards owned said land adjoining on the east, he had the privilege of bringing all the water that he desired to make use of on to his premises through a ditch which runs on to his land at his south-east corner, and which ditch extended in an east direction from said south-east corner between the lands of appellant and Daniel Simmons.

That appellant acquired title to the land adjoining respondent on the east in 1873, and that at intervals since said time he has diverted about one half of the water flowing from said springs away from the lands of the respondent, and that said waters so diverted were never allowed to flow on to respondent's home farm, but passed around the same on other lands adjoining thereto, and that a large portion of said waters were flowed by appellant into a lane through which a country road had been located, and that respondent never consented to said diversion, but frequently objected thereto.

Statement of Facts.

That in February, 1876, appellant diverted all the water flowing from said springs away from respondent's south-east corner, by means of ditches which he dug for that purpose and by deepening ditches which had already been dug, and caused it to flow into the most northerly of the channels formed by the spring branch, from whence it flowed on to respondent's land, through an aperture in the wall between the lands of respondent and appellant, which had been caused by a flood of the Umatilla river in the year 1876, and which aperture had never been filled with dirt, but across which a fence built of rails and poles had been constructed. That respondent has thereby been deprived of the use of said water for the purposes of irrigation and watering stock, and has been greatly damaged by means of the increased flow of water upon his premises in said northerly channel, etc.

Appellant, in his answer in substance, claims that the waters of the spring branch, prior to the digging of ditches, all reunited on his land and flowed on to respondent's land, through the most northerly of the channels described in the complaint, and that the water which flowed northerly on respondent's south-east corner came from a slough which has its source in Daniel Simmons' farm, and which does not naturally unite with the waters of the spring branch until after it passes on to respondent's land. That Daniel Simmons and respondent, acting together, have constructed ditches on Simmons' land, which have changed the natural flow of the waters of the spring branch, and that appellant has thereby been injured. That Simmons has built a dam across the spring branch, and backed up the water into appellant's cellar. That respondent, about two years ago, constructed an embankment across the north channel described in the complaint, by means of which the waters of the spring branch have been backed up on appellant's land and his meadow overflowed, to his damage, etc.

J. H. Turner, and Dolph, Bronaugh, Dolph & Simon, for appellant.

Lucien Everts, for respondent.

Opinion of the Court—Boise, J.

By the Court, BOISE, J.:

There are in this case no legal propositions which present any difficulty. If the stream of water in controversy was running in a well-defined channel through the lands of the respective parties, they would each have a right to have it continue to flow in its natural course without diminution, except so far as the same might be legally used by each riparian proprietor, while passing through his premises, for domestic use, stock, and reasonable irrigation. But, from the evidence, it appears that this stream, before its flow was disturbed by ditches, spread out on the lands of both parties into a swamp, with no fixed and definite channels, especially when the water was flush. It entered the lands of the appellant by two channels, and the evidence is conflicting and uncertain which carried the most water at the time the first ditch was made, which is marked on the map in the brief as ditch S. We think, however, that the evidence tends to show that prior to the making of this ditch, which was about the year 1861, some of the water flowed about the south-east corner of Coffman's land, and stood in stagnant sloughs during the dry season. This appears from the direct testimony of some of the early settlers, and from the testimony of the surveyor, F. E. Habersham, who shows from the elevations of the ground that the water could flow about said corner, and he traces old channels or swales leading around that point; and the undisputed fact that this stream spread out and made a swamp, which produced tules or rushes near this locality, shows that the water must have gone there and remained during the season. The testimony, however, tends to show that before ditch S was made, the surplus water flowed on in different channels across the lands of appellant, and most of it passed on to the land of respondent, at or about the point marked "levee" on the map.

But the evidence is very uncertain as to which channel then carried the most water. This ditch S was cut across the west channel and dammed it up, so that from that time on for many years the water ceased to flow down the west

Opinion of the Court—Boise, J.

channel, and consequently had a tendency to obliterate all the channels which formerly carried the water about respondent's south-east corner. It appears that the respondent soon after ditch S was dug extended it to his south-east corner and the water ran there for years. It was afterwards agreed between the respondent and Martin Robbins, who owned the land now owned by appellant, that respondent might divert a part of the water through ditch S to his south-east corner, and Martin Robbins might convey a part of the water to his barn, which was done by ditch E, he (Robbins) joining said ditch with Simmons at his line. This continued for some five years, when the parties quarreled about the water, each claiming a right to use it all; Coffman claiming a right to take it all to his south-east corner, and Robbins claiming the right to have it all flow through his land wherever he chose. It is claimed that if Coffman had been taking a part of the water to his south-east corner, it was by a license which was subject to be revoked by Robbins at any time. It is also claimed that if he had been taking the water by an agreement to divide the water which had been acted on by both parties for a number of years, such agreement is by parol and not binding, being void by the statute of frauds. And also, if it was binding so far as to be upheld by a court of equity, both parties having repudiated it when they quarreled, it became void by their acts.

We think that if the parties divided this water by mutual consent, and then, on pursuance of such agreement, Coffman dug ditches to receive one half of it and dispose of it at his south-east corner, and Robbins did the like on his land, and each took and enjoyed the water for years under this agreement, such a contract should be upheld in equity, for the agreement was a legitimate and proper one, and as the consideration (which was the digging the ditches and taking care of the water) was paid and the possession given, the agreement could be enforced in equity; and if these equitable rights once attached they would not be destroyed by a mere quarrel between the parties, for neither gained or lost a right by this disagreement. Such dis-

Points decided.

agreement is only evidence tending to show that the agreement never existed, or had not been performed. And we think the evidence shows that the agreement was made and that the rights under it still exist, unless Thomas Robbins bought without notice. The evidence shows that when he purchased the land this water was running as divided in the ditches, and Coffman was in possession, taking his half to his south-east corner, and Robbins must be presumed to have purchased knowing this fact. We think, therefore, that these parties have each a right to one half of this water, as decreed by the circuit court.

We think, also, that the evidence shows that both parties have been at fault in seeking to evade the agreement by which the water was divided; for it appears that the respondent claimed that he had a right to take all the water to his south-east corner and deprive Robbins of all the water, and that both parties have been injured by turning the water from the ditches and letting it flow at will. It seems to have been an unfortunate quarrel between neighbors, by which both have suffered. And we think that while the court is called on to settle the rights of the parties to the water, as neither party is without fault and both have been injured, neither should recover damages, and the decree will be modified in this respect; and appellant will be entitled to costs in this court, and respondent in the circuit court.

8	284
11	104
11	105
20	180
21	357
4*	600
25*	380
8	284
430	469
8	284
41	548

THE COYOTE GOLD AND SILVER MINING COMPANY, RESPONDENTS, v. WILLIAM RUBLE AND WALTER RUBLE, APPELLANTS.

CORPORATIONS—POWER OF DIRECTORS—FUTURE PROFITS.—In forming a corporation under the statutes of Oregon, it is the province of the corporators to perfect the corporation by opening stock books and obtaining subscribers to the capital stock. The corporators have no power to make regulations which shall bind the action of the directors in disposing of the future profits of the corporation, except so far as the same are regulated in the articles of incorporation.

IDEM—FUTURE CORPORATION—PROPERTY HELD FOR.—The corporators may receive and hold property for the use of the corporation to be formed by them.

Statement of Facts.

IDEM—STOCKHOLDER.—A person may be a corporator who is not a stockholder.

IDEM—RECORDS ONLY EVIDENCE.—The proceedings of a corporation must be shown by its records.

IDEM—ASSESSMENT, LIABILITY FOR.—To make a stockholder liable to pay an assessment on his stock, the assessment must be made by the directors, which must be proved by the records of the corporation.

IDEM—STOCKHOLDERS' AGREEMENT.—Agreements made by the stockholders of a corporation before it is organized by electing directors, to become binding must be adopted or agreed to by the corporation or the directors thereof after it is organized.

IDEM—STOCK MUST BE SUBSCRIBED.—The stock to a corporation necessary to its organization must be subscribed before the corporation can be legally organized.

IDEM—SUBSCRIPTIONS, HOW MADE—EXPRESS AUTHORITY.—To render a person liable as a stockholder to a corporation, he must sign his name to the subscription of stock, or authorize an agent to do it for him, and this authority must be express, and not implied.

IDEM—ORIGINAL STOCKHOLDERS—ESTOPPEL.—All original stockholders are only made liable on their subscriptions for stock by a writing, and are all equal before the law, and there is no estoppel between them.

IDEM—DIRECTORS.—Papers and agreements made by persons contemplating becoming stockholders to a corporation before an organization, and not intended to be subscriptions to stock, and relating to the future management of the corporation, do not give authority to the secretary of the corporation to place the names of the persons who subscribed such papers and agreements in the list of stockholders on the stock book.

IDEM—NOTICE TO STOCKHOLDERS—ESTOPPEL.—In an action by a corporation to recover a subscription to stock, the conditions of the subscription may be inquired into, for both parties are chargeable with notice of such conditions, and there is no estoppel.

IDEM—STOCKHOLDER REQUIRED TO CONVEY TO COMPANY, WHEN.—Where R. purchased with his own money certain mining claims, with the understanding that he would transfer the same to a company, of which he was one, which company was to own these claims, with other claims, which were to be worked together, it being necessary to so work them to secure water-rights to make the whole valuable; and R., after securing in his own name claims which if held by him in severalty would greatly injure the other claims of the company, may be required to convey to the company, on being tendered to him the money he paid for such claims.

APPEAL from Jackson County.

This is a suit to enforce a trust concerning real property, and for an injunction and damages against the appellants. The respondent corporation was incorporated for the pur-

Statement of Facts.

pose of owning and working certain placer mining claims, with a capital stock of two hundred thousand dollars, in shares of the par value of one dollar each.

The complaint alleges that the claims and property in question were, at the date of the incorporation, to wit, August 27, 1878, owned by the several following named parties, each owning certain distinct parcels thereof: O. Jacobs and H. Kelly, Ash & McWilliams, P. H. O'Shea, Davis & Rathbon, John Robertson, and Daniel Mathews. That the appellant, Wm. Ruble, as a subscriber to the capital stock of the incorporation, obligated himself to, and promised and agreed to pay upon his subscription for fifty thousand shares of the capital stock, the sum of ten thousand dollars—seven thousand dollars thereof down, and three thousand dollars on or before the first day of November, 1878, and the further sum of twelve thousand five hundred dollars when realized out of one half of the net proceeds of one fourth interest of the said mines.

That Ruble agreed and promised to pay the said sum of money to the persons then owning the said mining claims, to apply upon the consideration to be paid therefor for the use and benefit of the corporation, and to take and receive from such of said owners, to whom such payment should be by him made, conveyances to the company for such portions of the said mining claims, lands, property, fixtures, and appurtenances as should be by him paid for.

That on or about the fourth day of September, 1878, Ruble did, in accordance with his promise, and in pursuance of the trust reposed in him, pay upon his subscription the sum of nine thousand five hundred and fifty dollars, and of other money belonging to the company the sum of seven hundred and fifty dollars, in the following amounts, to the following-named parties, to wit: Davis & Rathbon, two thousand dollars; Ash & McWilliams, four thousand dollars; P. H. O'Shea, three thousand three hundred dollars, and John Robertson, one thousand dollars.

That he, Ruble, took from such parties, conveyances of the property in question, to himself, instead of to the company, and that on the twenty-seventh of November, 1878,

Opinion of the Court—Boise, J.

he fraudulently conveyed to the appellant, Walter Ruble, the mining claims, ditches, water rights, and flumes, known as the Davis & Rathbon and John Robertson claims, which had been conveyed to Wm. Ruble as aforesaid; that Walter Ruble took with knowledge of the trust and without consideration.

Wm. Ruble answered and denied all the material allegations of the complaint except the existence of the corporation, which, it is alleged, was constituted on the sixth day of September, 1879, and alleges that he is damaged by reason of the injunction sued out in the sum of ten thousand dollars, and demands judgment accordingly. Walter answers by denying the allegation of the complaint and claiming damage by reason of the injunction in the sum of eight thousand dollars.

The circuit court decreed a conveyance of the property to the company and adjudged damages in its favor in the sum of four thousand dollars.

John Kelsay, J. F. Gazley, and Thayer & Williams, for appellants.

C. W. Kahler, A. C. Jones, R. Mallory, W. H. Holmes, and J. H. Reed, for respondent.

By the Court, BOISE, J.:

The issues of fact, presented by the pleadings, are: 1. Was William Ruble a stockholder in the corporation, of fifty thousand shares of the capital stock? 2. If he was such owner, did he become legally liable to pay the same to the corporation before he bought the land in question? 3. Was the money which Ruble paid for the land in question the property of the corporation? 4. If not the money of the corporation, was Ruble acting for the corporation as its agent in buying this land, and so related in his actions in buying the land that he now holds the same in trust for the corporation?

The respondent's claim is that Ruble is its trustee, holding this land for the benefit of the corporation.

Opinion of the Court—Boise, J.

To show the affirmative of these several propositions the counsel for the respondent offered in evidence, first, a writing, which is as follows:

“ Know all men by these presents, that we, the undersigned subscribers to stock in a certain gravel mine situated on Coyote creek, in the counties of Jackson and Josephine, in the State of Oregon, agree to pay I. N. Muncy fifty per cent. of the capital value for each and every share set opposite our names, as follows: Twenty-five per cent. in hand, and twenty-five per cent. when taken out of the mine, over and above expenses. The said mine is to be divided into two hundred thousand (200,000) shares, of the par value of one dollar each, in gold coin of the United States. It being understood and agreed that each and every subscriber is to have one half of the net proceeds of the mine, *pro rata*, to the whole amount of the capital stock, until his stock shall be paid in full in said coin, as above mentioned, then he is to receive the amount of stock for which he has subscribed, free from all incumbrance, and full dividends thereafter upon said stock. It being further agreed and understood that the said Muncy is to, at his own expense, extend the ditch known as the McWilliams & Co. ditch down the said creek to a point on the hill above a claim known as the Robertson claim, and to purchase and place upon said mine another pipe fifteen inches in diameter, and of sufficient length for the successful working of said mine, together with a giant and flume corresponding to the same:

Paid Jay Francis.....	320
Paid by note, Joseph F. Lindsay.....	5,000
Paid by note and horse, James Chenoweth	1,000
Paid 25, Jennette Webb.....	100"

It will appear by inspection of the record, as well as by the subsequent testimony, that the name of Wm. Ruble, together with the amount of stock by him subscribed, and the words, “as per arrangement,” in the margin, are all in his own writing. This paper is not dated, but was signed by Ruble August 27, and which is the same date as the acknowledgment of the articles of incorporation.

Next after this paper the respondent offered in evidence

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the articles of incorporation and another writing, which are as follows:

EXHIBIT 2.

Coyote Gold and Silver Mining Company, incorporated at Salem, Oregon, August 27, 1878, as follows:

Be it known that the following articles of incorporation are this day entered into by I. N. Muncy, J. L. Murphy, David Stump, and Wm. Ruble, for the purpose of mining in gold, silver, and other precious metals; to purchase placer mines of gold, or ledges of gold, silver, or other precious metals; construct or purchase and own water ditches, quartz mills, or any other thing necessary to the successful prosecution of the work of mining.

Art. 1. The name of the company or corporation shall be known as the Coyote Gold and Silver Mining Company.

Art. 2. The duration of the company shall be indefinite.

Art. 3. The place of operation of this company shall be in Jackson and Josephine counties, in the state of Oregon.

Art. 4. The principal office of the company or corporation shall be at Leland, Jackson county, Oregon.

Art. 5. The amount of the capital stock of said company or corporation shall be two hundred thousand dollars, which shall be divided into two hundred thousand shares of one dollar each.

The above act of incorporation was executed in the city of Salem, in Marion county, Oregon, on the twenty-seventh day of August, 1878, signed by I. N. Muncy, J. L. Murphy, David Stump, and Wm. Ruble, incorporators, acknowledged before H. A. Johnson, justice of the peace in and for said county, and filed in the office of the secretary of state, September 2, 1878.

The incorporators named in the foregoing articles of incorporation agree and bind themselves severally to accept and to cause the directors of said company, when elected and organized, to ratify the contracts and purchases of certain bar and placer gold mines situated on Coyote creek, in Jackson and Josephine counties, Oregon, made by I. N. Muncy and Wm. Ruble.

And it is further agreed that stock books shall be opened,

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and the sale of stock of said company be ordered to the amount of two hundred thousand shares (including any shares already subscribed), of the par value of one dollar each, in gold coin of the United States, upon the following terms, to wit, that each share shall be sold for fifty per cent. of its par value, the payment to be made as follows:

Twenty-five per cent. of the par value in cash at the time of subscribing, and twenty-five per cent. to be taken out of the net proceeds of the mines, it being understood and agreed that each subscriber shall be entitled to receive, as dividends, one half of the net proceeds, according to the number of shares he holds, and that the other one half shall be retained by the company until the sum so retained shall equal his indebtedness for stock. Thereafter he shall receive certificates of paid-up stock for all the shares he may hold clear of all incumbrance, so far as the company is concerned, and full dividends.

It is further understood and agreed that said incorporators shall, within a reasonable time, extend the ditch known as the Ash & McWilliams ditch down said Coyote creek to a point on the hill adjacent to a claim known as the Robertson claim, and that they will purchase and place on said mines, in addition to the hydraulic already there, another pipe of fifteen inches in diameter, and of sufficient length for the successful working of the mine, together with a giant and flume corresponding to the same.

It is further agreed that the one half of the net proceeds to be retained by the company, as above specified, shall not remain as assets in the hands of the company, but shall be drawn out by the four incorporators as it accrues in the following ratio, viz: Wm. Ruble, one half ($\frac{1}{2}$), I. N. Muney, three eighths ($\frac{3}{8}$), J. L. Murphy, three fortieths (3-40), and D. Stump, one twentieth (1-20), said sums to aggregate twenty-five thousand dollars, and no more.

It is further agreed that after the payment of the purchase-money of said mining claims, the drawing of the twenty-five thousand by the four incorporators, as above specified, the payment of all costs and expenses of extending the ditch, purchasing and placing in position in work-

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ing order the pipe, flume, and giant, together with implements and tools for working said mines, all sums accruing from the sale of any remaining stock of said company shall be paid to I. N. Muncy. And in consideration of the last named agreement, the said I. N. Muncy binds himself, his heirs and assigns, to put the said company in full possession, with right and title, to all mining claims on Cayote creek, beginning at the lower end of a mining claim formerly owned by Davis and Rathbon, and extending up said creek nearly three miles, including all the mining ground owned on said creek by Davis and Rathbon (*and Marshal*), H. Kelly, O. Jacobs, Robertson, O'Shea, Mathews, and Ash & Williams, together with all water rights, mining privileges and appurtenances thereunto belonging, to said company, to have the same in fee-simple, yet so as the net proceeds shall inure to the benefit of the stockholders upon the terms and conditions herein specified:

Sept. 14, 1878.

Subscribers' Names.	Amount of Stock.
David Stump.....	5,000 shares
J. L. Murphy.....	7,500 "
Wm. Ruble.....	50,000 "
J. F. Bewley.....	2,000 "
W. F. Lemon.....	100 "
Z. Davis, per I. N. Muncy.....	2,000 "
E. A. Chase, per I. N. Muncy.....	1,000 "
H. Kelly, per I. N. Muncy.....	1,000 "
T. S. Rodabaugh, per I. N. Muncy.....	5,000 "
I. N. Muncy.....	50,000 "
G. W. Sloper.....	50 "
John Vernon.....	1,000 "
H. D. Ray.....	2,000 "
R. Doty.....	2,000 "

This last paper which is attached to the articles of incorporation, is dated on the fourteenth day of September, 1878; and it seems (from a comparison of dates with the records of the corporation) was executed the day that the stockholders met to organize the corporation, and from its terms indicates that it was executed before any organization was made, and was preliminary thereto, and with a view to securing an endowment to Monmouth College of twenty-five thousand dollars. In order that the provisions should

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in any way become binding on the corporation, it was necessary that the corporation, after it was organized, should accept and approve of these provisions; and whether or not the corporation did so adopt and approve can only be shown by the records of the corporation. For neither the corporation nor others who contemplate taking stock can, before the corporation has been organized by electing directors, dispose of the future earnings of the corporation nor fix rules to control the action of the directors to be elected.

The statute, p. 525, secs. 5 and 6, provides for and fixes the powers and duties of corporations. Their office is to start the corporation and proceed to perfect its organization as provided for in section 7, and it is only after such organization that it is capable of carrying on the enterprises enumerated in the articles of incorporation. The acts which the incorporation are authorized to do are such as tend to promote the final organization by the election of directors, when the stock becomes liable to be assessed for the purpose of raising funds with which to prosecute its legitimate enterprises. It was not contemplated by the statute that the corporation should be empowered to make assessments and prosecute the business for which the corporation was created. The stock is not due and liable to assessment until after the organization by the election of directors; and it is provided in section 7 of the act, "that at the organization each stockholder shall be entitled to one vote for such share of capital stock subscribed by him; but after such first election of directors, no person shall vote on any share upon which any installments or portion thereof, is then due or unpaid." Section sixteen, also, provides "that if any such corporation does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of filing articles, etc., shall be divested of its corporate rights."

The stock is the capital of the corporation on which it is to do business, and it does not become available for that purpose until after directors are elected. All proceedings of the corporators (who need have no pecuniary interest in the corporation) which are prior to such election are steps

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in the organization, and are not binding on the corporation except so far as they promote such organization, and the business for which the corporation was formed, as expressed in the articles. And, indeed, the whole spirit of the act indicates that in order to perfect a corporation for prosecuting its enterprises the election of directors is a condition precedent to its perfect organization for business purposes. We think a corporation may hold property necessary for its contemplated enterprises, before its organization is completed, and preserve such property for its future use, and that the corporation exists as a legal entity from the time of the filing of its articles. But the corporators who represent it prior to a meeting of the stockholders are its agents, to perfect its organization and put it in working order, rather than to carry on its business enterprises.

We think that the paper offered in evidence executed on the twenty-seventh of August, 1878, contains no stipulations or agreements which afterwards became binding on the corporation or any of the persons who signed it, for the reason that there is no competent evidence showing that the provisions contained in said agreement were ever adopted or agreed to by the corporation, and that such an agreement by the corporation can only be proved by the records of the corporation, and there is no such record in its proceedings. The same may be said of the other agreement made on the fourteenth of September, 1878. This contained stipulations which could not bind the corporation unless agreed to by the corporation, for it provided for the disposition of the profits of its future business, and it is a self-evident proposition that neither a person nor corporation is bound by a contract which was never agreed to by such person or corporation. We think that Ruble did not become a subscriber by signing these papers above referred to.

We do not, however, decide but what these documents may be competent as tending to show that he authorized his name to be put on the stock books and to explain his subsequent conduct. But suppose Ruble was a subscriber, when did he become such? Certainly not until he authorized his name to be subscribed to the capital stock, by his direct

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act or conduct as a subscriber, and he did not act in that capacity until the organization on the fourteenth of September. What he did prior to that time for the corporation was as a corporator or agent of the corporation.

If he was a subscriber, when did he become liable to pay his subscription? We think that liability did not accrue under the corporation until after the directors were elected and an order made for a call for the stock, unless by the terms of the subscription the payment is to be made without a call. So this subscription could not in any event have been demanded before the fourteenth of September. Prior to that time the corporation had no secretary or treasurer, or capacity to demand subscriptions. So if this position be true, Ruble, at the time he purchased these claims was not owing the corporation the money he paid for the property, and it was his unless he voluntarily parted with it to the corporators, of which there is no evidence (except that the money was carried to the depot in the canteens of Muncy, which Ruble had borrowed), and he then had the legal right to invest the money on his own account, for it was still his money though he may then have instructed to pay it on his future subscription to the corporation, and if he did go to the mines to buy these claims for the corporation with his own money, and afterwards changed his mind, either from a good or bad motive, and took the deeds in his own name, there would be no such resulting trust to the corporation as could be enforced against him until the purchase money was refunded to him or he be placed in such a relation to the corporation as would be equivalent to a tender of the purchase money which he had paid. It is claimed that he owed the corporation this amount at the commencement of this suit. To put him in such a position he must be a subscriber to the stock of fifty thousand dollars. The records of the corporation must show that this amount is due and owing. To show this, it must be shown by the records of the corporation: 1. By the stock book signed by Ruble or evidence equivalent to such signing. 2. That one half of the capital stock of the corporation has been subscribed. 3. That an assessment has been made on

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all of such stock for cash for twenty-five per cent. of such stock.

None of these things appear from the records of the corporation, except that one half of the capital stock appears in a list on the stock book to be subscribed. But all the names of the subscribers appear to be placed in this list by the secretary, William Ruble, except his own name, which is in the handwriting of W. F. Briggs, and without the consent of Ruble, who refused to sign the same, and this list was so made by the secretary after this suit was commenced. The undertaking to which these names are subscribed is as follows: "We, the undersigned, subscribers to the capital stock of the Coyote Gold and Silver mining Company, do hereby bind ourselves to take the number of shares that we subscribe for, and to pay therefor in United States gold coin, as per conditions entered into by the incorporators and others, in the town of Monmouth, Polk county, Oregon, September 14, 1878, and recorded in the journal of said company, on pages 5, 6, and 7." "Names of original subscribers." Then follows the list of subscribers in the manner following:

Subscribers' names. P. O. Address.	Amount of stock.	Amount paid.	When paid.
David Stump, Monmouth, Polk Co.	5,000.	\$2,500.	Jan. 17, 1879.

And other subscribers in like manner. These conditions referred to in the undertaking are contained in exhibit number two, above set out in this opinion. One of these conditions is, "that the incorporators agree and bind themselves severally, to accept, and to cause the directors of said company, when elected and organized, to ratify the contracts of and purchases of certain bar and placer gold mines, situate on Coyote creek, in Jackson and Josephine counties, Oregon, made by J. N. Muncey and William Ruble." Another condition is, "that said incorporators shall, within a reasonable time, extend the ditch known as the Ash and McWilliams ditch down said Coyote creek, to a point on the hill adjacent to a claim known as the Robertson claim, and that they will purchase and

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place on said mines, in addition to the hydraulic already there, another pipe of fifteen inches in diameter, and of sufficient length for the successful working of the mine, together with a giant and flume corresponding with the same." This agreement was intended to limit and regulate the action of the corporation then to be organized, and which was organized on the same day this agreement was executed; and in order to make the subscribers liable for stock, it was incumbent on the corporation when organized, to perform and carry out the conditions of the contract which the subscribers had signed, and which was the foundation of their liability. They should have notified the contractors and purchasers of J. N. Muncey and Ruble, or attempted to do so by some resolution or proceeding of record; and also the incorporators should have extended the ditch and placed the pipe and a giant in the mine as agreed. And it should appear from the records of the corporation, that it had performed on its part, before it could compel individual stockholders to perform by paying subscriptions. The directors of this corporation show by their record no compliance or attempt to carry out these fundamental conditions above named. Nor is there anything said or done in said records as to any effort being made by the corporation to have J. N. Muncey put the company in the possession of the mining claim named in the last part of said agreement. Nor does said Muncey comply or attempt to comply with his part of said agreement.

It is evident from this agreement that the opening of stock books and the ordering of the sale of stock were proceedings to be had after the corporation was organized, and such orders should appear in the records of the corporation.

The corporation had no authority to make this order to reduce the stock to half price, for the statute limits their powers, section 4, page 525, when it says the articles shall specify "the amount of the capital stock," and "the amount of such shares of such stock." This must be the true, not the fictitious amount.

Thus section 6 provides that it shall be lawful to organize when one half of such stock is subscribed, so that the

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incorporators could not order that the stock should be paid in full on the payment of one half. And it appears from the records of the corporation which are before us in evidence, that as yet no such proceedings have been had by this corporation as will enable them to enforce the payment of this stock against individual stockholders. And consequently the corporation shows no indebtedness due from Ruble to them, which is an equivalent of a tender to him of the money he had paid for this land.

It is claimed by the respondent that Ruble is estopped from disputing that he was a subscriber of fifty thousand dollars of the capital stock of this corporation, by his acting as secretary, and acting and voting as a subscriber, and serving as a director. The evidence shows that at the meeting of those who claimed to be stockholders and who elected the directors, each individual voted one vote without reference to the number of shares held by him, and that at that time no subscription had been made to the capital stock which would bind any subscriber to pay, unless he became so bound by having voted at this meeting, or acted as an officer. The list of stockholders whose names appear on the stock book, appear to have been placed there after this organization by the secretary, and would not be the subscriptions of these individuals unless authorized or assented to by them. These preliminary papers were not subscriptions, and did not authorize the secretary to subscribe the stock book for the persons who had subscribed these papers. (*Granger Market Co. v. Vinson*, 6 Or. 172.) If any of these persons whose names are on this stock book were sold for a call on the stock, he could answer that he had not subscribed; or, if he had subscribed, could set up any condition precedent to payment, to be performed by the corporation, and which had not been performed. As in this case, the conditions in the agreement of September 14, to be performed by the corporators, had been violated, for as between the corporation and its stockholders, the conditions of a subscription may be inquired into, for both parties are chargeable with notice of these conditions, and there is no estoppel. Any actions or declarations of

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Ruble, made after the election of directors, that he was a subscriber, are evidence to show that his name was placed on the stock book with his assent, and if, in this case, one half of the capital stock of this corporation had been actually subscribed, and the corporation duly organized by the election of directors, as pointed out by statute, and Ruble had accepted the position of director, supposing that his subscription to these preliminary papers amounted to a subscription, he might be held as a subscriber; and if sued for one assessment, could only make as a defense that the same was not due by the conditions of the subscription. But in this case, as has already been said, this corporation proceeded to organize before the stock was subscribed, and as the proceedings were fatally defective, any member might repudiate it as between his fellows, unless afterwards he subscribed the stock; or so far proceeded with his fellows in the business as to cure this defect, and there is no legal evidence that any new obligations were assumed. There is a large amount of testimony tending to show that Ruble was active in getting up this corporation, and inducing others to take an interest in it. But all these parties were bound to take notice of the condition of the corporation, for each had access to its original subscription, if any there was, the same as Ruble, and as all subscriptions must be in writing, all stockholders stand equal before the law.

When this corporation claims that Ruble owes it twelve thousand five hundred dollars, as one fourth of his capital stock to the corporation by him subscribed, and he denies the subscription, it is necessary for the corporation to prove the subscription by producing the subscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription. And as has been already stated, we do not think these acts show that he was a subscriber, or that the proof shows that the other persons whose names are put down as subscribers in the stock book have subscribed in such a manner as would make them liable to an assessment for unpaid stock. (See 6 Or. 172.) But we think the evidence does show that Ruble purchased the property in

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question, intending at the time that it should be for the use of the company, and that he took the title in his own name to secure himself for the money he paid, and that he continued to hold it with such intent until after the meeting at Monmouth on the fourteenth of September, 1878. For on that day, in the agreement of that date already set out, the incorporators, of whom Ruble was one, agreed to bind themselves severally to accept, and cause the directors of the corporation, when elected and organized, to ratify the contracts and purchases of certain bar and placer gold mines, situate on Coyote creek, in Jackson and Josephine counties, made by I. N. Muncy and Wm. Ruble. And the evidence establishes the fact that the mines referred to in this agreement as purchased by Ruble are the property in controversy. And as Ruble signed this agreement, we think he plainly signifies in it his intention to transfer this property to the corporation, and as the evidence shows, that it was the object of all the parties (including Ruble) to secure all these claims and the water to work them, because they would be much more valuable if owned and worked together than if owned severally. If for any reason Ruble saw fit to withdraw from the corporation and not subscribe to the capital stock, he should, on being paid the money he expended in securing these claims, transfer the same to the corporation, and it is not equitable in him to hold a part of those claims to the manifest injury of those who joined with him in trying to secure what they evidently thought a valuable mine when consolidated in one ownership.

But we do not think this court can make a corporation for the plaintiff from the evidence, with Ruble as member and stockholder, and declare him indebted to the corporation the sum of money he paid for this land. And if the corporation desires this property, and it is of the great value claimed by the plaintiff, no injustice would accrue to the plaintiff if Ruble should retire from this mining enterprise, and on the payment to him of his money, be required to transfer the property to the corporation; and the plaintiff can have no pecuniary interest in holding Ruble as a mem-

Opinion of PRIM, J., dissenting.

ber of the corporation, unless the land is worth less than he paid for it, or it be desirable for the plaintiff to return the money paid by Ruble as working capital. And as he purchased these mining claims with his own money, but under such representations to the incorporators as would make it inequitable for him to hold the same against the corporation (provided the corporation tenders him the purchase-money), because this land is so situated as to render valueless the other claims about which all these corporators were negotiating, and to work which the corporation was formed, it will be necessary for the corporation to first tender Ruble his money, or put him in a position of indebtedness to the company, which is equivalent to a tender, which has not been done. (Perry on Trusts, sec. 129.)

We think, therefore, that the plaintiffs have not proven the essential facts to maintain their complaint, and that the decree of the circuit court should be reversed and the plaintiff's bill dismissed.

Mr. Justice PRIM, dissenting:

Being unable to agree with the opinion of the majority of the court in this case, I feel compelled to dissent.*

Under the facts as developed by the evidence in this case, I hold that it was the duty of Ruble: 1. To have filed the third articles of incorporation in Jackson county; and, 2. To have bought the mining ground in dispute for and in the name of the corporation then being formed for that special purpose; not, as is claimed by him, with money of his own, which was to be returned to him, but with money which he, and others engaged in the enterprise, had agreed to advance for that purpose, and in consideration of which Ruble was to own and to have issued to him fifty thousand shares of the stock of the corporation, when the same was in a condition to make such issue.

But it is sought, on behalf of Ruble, to repudiate and avoid his agreement with the subscribers to the preliminary agreement and with his co-corporators, on the ground that

* A very full statement of facts embodied in the opinion is omitted.—REPORTER.

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the corporation was not in existence at the time when the agreements were made and at the time the conveyances were taken, as at that time the third articles of incorporation were in the possession of Ruble, and not on the files in Jackson county, where, under his agreement, they should have been. This position appears extremely technical, and, in my judgment, should not be allowed to prevail. Ruble, being at the time a special agent and trustee for the purpose of filing these papers and securing these mines to the corporation plaintiff, ought not to be allowed, even in a court of law, much less in a court of equity, to take advantage of his own wrong and want of good faith, since equity always treats "that as done which of right and justice should have been done."

It is further claimed that Ruble was exonerated from compliance with his agreement on account of irregularity in the organization of the plaintiff corporation, as well as informality in its subsequent proceedings. In answer to this position, it may be suggested that it could have made no difference whatever with Ruble as to what was to have been done after he had complied with his agreement, inasmuch as he did not comply with it, whether the subsequent proceedings were regular or not. Thus it will be seen that subsequent informality could not exonerate him. And it will be further noticed, by closely observing the facts, that nothing would have gone wrong in the entire enterprise, except for Ruble's own dereliction and want of good faith. In the view which I have taken of this case, I regard it as immaterial whether Ruble, technically and in the strict sense of the term, became a stockholder in the plaintiff or not. There can be no doubt but that the preliminary subscription, gotten up by Muncy, related to the property in question, and that the plaintiff was incorporated for the purpose of absorbing this very preliminary association. It was understood between Ruble and his associates, after subscribing the Muncy papers, that he was to own one fourth of these mines, and that the others were to own interests therein in proportion to the amount subscribed. After signing the Muncy papers, Ruble took a lively inter-

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est in the enterprise, and assumed nearly the entire management thereof, suggesting the propriety of incorporating immediately, preparing the articles of incorporation, and causing them to be executed, acknowledged, and filed, as required by the statute in such cases.

In the organization of the incorporation the Muncy subscription was adopted as its subscription of stock, as is conclusively shown by the construction placed upon it by all parties concerned in the enterprise. All the subscribers, including Ruble, recognized and treated it as such. Ruble notified them, as subscribers of stock, to appear at Monmouth on September 14, 1878, for the purpose of organizing the corporation, by electing directors and other officers. All of the subscribers, in obedience to this notice, did appear either in person or by proxy, and the organization of the plaintiff, then and there accomplished, was based upon this subscription and none other. Ruble claimed to own fifty thousand shares in the stock by virtue of said subscription and the right to vote the same. As a matter of fact he was elected one of the directors of the corporation by virtue of this subscription, and he was also elected secretary of the corporation. Both of these offices he then and there accepted, and entered upon the discharge of these duties. As such secretary he transferred the preliminary subscription to the regular stockbook of the company, with the exception of his own subscription, which he failed and refused, for some cause, to transfer. He also issued certificates of stock to all the subscribers except himself. Having thus taken the lead and principal management of this enterprise upon himself, he has succeeded in securing the title to the property in dispute in his own name; which virtually gives him control of the other mines not conveyed to him, as he has succeeded in securing those which control the water rights.

I claim that, under the facts in this case, Ruble is estopped in equity from denying that he is a stockholder in the plaintiff. (Thompson on Liability of Stockholders, secs. 105, 124, 162, 165, 166; 5 Otto, 667; *Dong v. Naper*, Supreme Court of Ill., 8 Reporter, 522.)

Points decided.

And while I concede that in equity Ruble may have been entitled to a lien upon the property in dispute, to secure him in whatever amount he may have advanced or paid on the property in excess of his proportion, and that while the court might and should have secured said lien by a proper decree, I am unable to assent to the proposition that he may "change his mind, either through good or bad motives," and wholly retire from the enterprise and hold the property in his sole right, unless his associates shall refund to him the whole amount advanced by him to pay for said property.

In my opinion the bill ought to be retained and the decree of the circuit court modified in accordance with the views herein expressed.

8	303
32	309
32	312

**J. C. MORELAND, RESPONDENT, *v.* MATTHEW BRADY,
APPELLANT, AND GEORGE A. BRADY, DEFENDANT.**

WILL—EXTRANEous ORAL EVIDENCE ADMISSIBLE, WHEN.—While it is admitted to be the general rule that oral evidence is not admissible to explain or vary the words of a written instrument, there are exceptions and qualifications of the rule, where the force, operation, and construction of the written instrument are concerned. *Falsa demonstratio non nocet* has become a thoroughly established maxim of the law, the practical meaning of which is that however many errors there may be in the description either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show with reasonable certainty the intent of the devisor. Extraneous oral evidence is admissible to show the state and extent of the testator's property at the time the will was executed, in order that the court may be placed in the position of the testator at the time and be able to read the will in the light of surrounding circumstances.

ITEM—MISDESCRIPTION OF DEVISED PROPERTY.—Where a will devised to Margaret lot 2 in block 187, and to Esther lot 1 in block 187, and it appeared that the testator had no such lots as 1 and 2 in block 187, but did own lots 3 and 4 in said block: *Held*, that the erroneous part of the description might be rejected and that the remainder was sufficient to identify the property with reasonable certainty.

MARRIED WOMAN RESIDING OUT OF STATE MAY EXECUTE POWER TO CONVEY.—Where a married woman owns land in this state in her own right and she and her husband reside out of the state, she may, by joining in a power of attorney with her husband, empower another to convey such property.

Argument for Appellant.

APPEAL from Multnomah County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Simon, for appellant:

The plaintiff has shown no title to any interest which Esther Brennan might have had in the premises described in the complaint; Esther Brennan, being a married woman, could not convey real property by attorney. (General Laws of Oregon, 515, secs. 1 and 2; Hittell's Statutes of California, p. 103, secs. 643, 644; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 646; *Dentzel v. Waldie*, 30 Id. 138; *Maclay v. Love*, 25 Id. 367; *Matt v. Smith*, 16 Id. 533; *Morrison v. Wilson*, 13 Id. 494; 3 Washburn on Real Property, 233; *Earle v. Earle*, 1 Spence, 347; *Sumner v. Conant*, 10 Verm. 9; *Kearney v. Macomb*, 1 C. E. Green, 189; *Lewis v. Cox*, 5 Harring, 401; *Dawson v. Shirley*, 6 Blackf. 531; *Allen v. Hooper*, 50 Maine, 373; *Judson v. Sierra*, 20 Texas, 365, 371.) Nor does section 15, of title 1, of chapter 6, General Laws, authorize a married woman to convey real estate by power of attorney. This section only relates to the acknowledgment of the deed, and by the terms of the statute itself the wife must join the husband in the conveyance.

Another question is suggested for the consideration of the court: Can a married woman in this state convey the land of another as attorney in fact? Margaret McGill, the attorney in fact of Esther Brennan, was a married woman.

The circuit court in this case attempted what has never been done by any court before, to make a will for a deceased person, or what was just as legally impossible, to hold that the devisees could make a will for their testator, or by agreeing to a division of the testator's property between themselves make a good devise not described in the will, and in a case where the intention of the testator could not be ascertained.

The evidence upon this question may be stated as follows: A block in the city of Portland consists of eight lots numbered and situated as follows:

Argument for Appellant.

N.

8	1
7	2
6	3
5	4

Bernard Brady had an equitable title to lots 3 and 4 in block 187. He did not own lots 1 and 2 in block 187. He devised by his will lots 1 and 2 in block 187, one lot to his sister Esther and one to his sister Margaret. It may be reasonably supposed he intended to devise the lots he owned and not those he did not own.

Thus far the court can go with safety, and thus far the authorities go; and, if the two lots had been given to the two sisters jointly, the court could have corrected the will. But which lot did the testator intend to give to Esther and which to Margaret? There is nothing in this case from which the least clue to the testator's intention can be obtained, and because there is not, the court can not correct the will. A court can only carry out the intention of the testator, as ascertained from the will, and the condition of the parties and property. We understand that the court, in this case, felt this difficulty and undertook to avoid it, by saying that as the devisees had appropriated each a lot, the court would correct the will to conform to their action, but the fallacy of the proposition is apparent. It substitutes the acts of the devisees for the intention of the testator. In fact, it would be far more reasonable to suppose that as lot 1 is a corner lot and lot 4 is also a corner lot, the intention was to give Esther lot 4, instead of lot 3.

While under the maxim *falsa demonstratio non nocet*, courts will receive evidence to explain a latent ambiguity

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arising from facts *dehors* the will, yet the evidence must be such as to leave no doubt as to the intention of the testator. (Redfield on Wills, vol. 1, p. 573, 574, and note, 498, 499, 500, 571, 572, 576, and notes; 1 Greenl. Ev., sec. 290; *Miller v. Travers*, 21 Eng. C. L. 290; *Brown v. Saltonstall*, 3 Met. (Mass.) 423, 428; *Jackson v. Sill*, 11 Johns. 201; *Long v. Duvall*, 6 B. Mon. 219; 2 Iredell, 194; *Kurtz v. Hibner*, 55 Ill. 514; *Bishop v. Morgan*, 82 Id. 352; 36 Iowa, 674.) The only evidence admissible is such as tends to place the court in the same position as the testator, in regard to his property. Extrinsic evidence can not be received to show intention. (1 Redfield on Wills, 496, 497, 499, and note, 500, 539, 540, 621, 622; 1 Johnson Ch. 231; 7 Monroe, 624; 2 A. K. Marsh, 51; 8 Mo. 56; 7 Metcalf, 188; 1 Paige Ch. 291; 8 B. Monroe, 600.)

Wm. Strong & Sons, for respondents:

There is no patent ambiguity in this will; it is all plain upon its face. It is only when you come to apply its bequests to the property of the testator, and learn that he never owned, or claimed to own, lots 1 and 2 in block 187, that you are called upon to look over the estate he left to see whether there is among it any property of a similar description to fill the bequests. You then learn that he had in his possession and claimed to own at the time the will was executed, and at the time he died, two, and only two, lots in block 187, not numbered 1 and 2, but 3 and 4. These correspond in description with the property described in the will, in a sufficient number of particulars, to identify them as the property he intended to devise to his sisters. The lots belong to him (he had bought them less than a month before his death), they are in block 187 in the city of Portland, they are all the lots he has, or ever had, in that block, or elsewhere, so far as appears, and in his will he has nowhere disposed of them specifically, unless he intended to do so in the bequests to his two sisters. We are forced to conclude, therefore, that the testator intended Nos. 3 and 4, and you reject the numbers given in the will as an error of description.

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There can be no doubt, in any candid mind, that he intended to devise Margaret McGill one of these lots, and Esther Brady (Brennan) the other; and that he did not intend any one else should have either of them, or that they should remain intestate for the heirs, or be left for the residuary legatees. There is nothing to show that he placed different values upon the lots, or that it would not equally satisfy his intention to give either one or the other to either sister.

Summing up what has preceded, the testator has given the two lots that he owned in block 187 to his two sisters. We reject the numbers 1 and 2, because they are a manifest error in description, and apply the devise to lots 3 and 4. He gives both of these lots to his two sisters, and does not intend any one else to have them, or either of them. He may have purposed to give to each a separate lot, but not having used language appropriate to that purpose—in the change which his mistake in the numbers has brought about—the will, which does not express this part of his intention, is the same as if he had not had any such intention, but it does clearly express his intention to give these two lots to his two sisters and to no one else, and, so far, his intention may and should be carried out. This can be done by making them tenants in common of both lots. This contravenes no provision of the will, is equitable, and wrongs no one. The only parties interested are the two sisters; but, as they have divided the property to their own satisfaction, the court will not disturb the division where the only effect will be to turn the property over to persons whom, it is certain, the testator never intended to have it.

Such construction seems allowable under the rule laid down in various works on construction of wills. 1 Red. on Law of Wills (sec. 30 c, subd. 15) gives the rule as follows: "There is no more clearly established rule of construction, than that words or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator. It is here said that words and limitations may be transposed, supplied, or rejected; but it must appear, either from the words of the

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will, or extrinsic proof, admissible in aid of the construction of the words, that the transposition does really bring out the true intent of the testator, and thus render what was before obscure, clear." (10 Paige, 140.)

Apply this rule to this will, and excluding superfluous words, fill in that which is implied, *viz.*, that the testator intended to describe what he owned, and put the two devises in juxtaposition, and we have this form:

"I give and bequeath a certain parcel of ground, or lots, which I own in the city of Portland, Oregon, *viz.*, lots three and four in block one hundred and eighty-seven, as follows, namely: Lot — to Margaret McGill, and lot — to Esther Brady, my two sisters."

The foregoing can not but be admitted to be exactly according to the intention of the testator, so far as the same is definitely expressed in the will, the description of the lots having been corrected by extraneous evidence as to the state of his property. This amounts to precisely the same thing as if the testator had said, The lots three and four in block one hundred and eighty-seven, which I own, I give and devise, one to my sister Margaret, and one to my sister Esther; or, I give and devise to my two sisters, M. and E., the two lots down in block 187, one to each. If we eliminate from this proposition the words, "one to each," the devisees become tenants in common, owning by fee-simple title one undivided half of both the lots. This title either can at will convert into a separate estate. There is absolutely no difference in the quality of the title they acquire. There is nothing in the will to show that the lots differ materially in value, and the evident intention of the testator is fully carried out.

This mode of obtaining from the will the intention of the testator, seems favored by the doctrine laid down by the highest authority on the construction of wills. (1 Redfield, secs. 6, 32.) "The general rule in regard to repugnancy in the different portions of the will seems to have been established from a very early day, that where there is no fair and reasonable mode of reconciliation, the latest of the con-

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tradicory provisions shall prevail. But this rule has not gained universal consent. The more rational, and perhaps more general opinion, at the present day, is, that where the same thing is given in the same will to different persons, they shall take jointly, either as joint tenants, or tenants in common, according to the terms of the devise or bequest. But, of two inconsistent limitations in a will, the latter must prevail." * * * "But the testator having given the same estate to two or more persons, in different portions of his will, it is the same as if all the names had been united in one gift of the same estate." * * * (Id. sec. 32.) "But courts will, if possible, adopt such a construction as will uphold all the provisions of the will. And in carrying this purpose into effect, it is permissible to resort to any reasonable intendment; and, if necessary, the relative order of devises or bequests will be reversed, as where an estate is first given to A., and then for life to B. The American courts seem generally to have adopted the rule, in the construction of wills, that where there is an irreconcilable repugnancy in different portions of the instrument, and the difficulty is not relieved by any of the other rules of construction applicable to the case, and both can not operate, the latest shall prevail over that which is earlier in time." * * * (Id. sec. 32, note 24, and authorities there cited.)

When two persons each have the right to either one of two specific things, it may perhaps be called a repugnancy; while if one person had the right to one of two specific things, it would create an ambiguity only. But in case one had the preference and selection by law, there could be no ambiguity. Upon this point we refer to a single case, which, though ancient, will commend itself to the court, for its brevity, at least: "It will here be noticed that when a testator gives to a legatee one or more out of several specific things, the legatee has an absolute right of selection." (2 Coll. 435, 441, quoted from 1 Roper on Legacies, 316.)

It is apparent that, in the case now before the court, one of these parties under this rule has the selection. It is not necessary for the court to determine which one, for the par-

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ties have divided by agreement—and this division concerns no one but themselves. Neither can say that she has not made the selection. "When the general intent of the testator is clear, and it is impracticable to give effect to all the language of the instrument, expressive of some particular or special intent, the latter must yield to the former." * * * (1 Redfield on Wills, 433; 9 Paige, 187; 35 Penn. St. 393; 4 Jones Eq. 203; 5 Harring, 91; 8 Mass. 3; 11 Id. 528.

By the Court, BOISE, J.:

This appeal is taken from a decree rendered by the circuit court for the county of Multnomah, in favor of the respondent and against the appellants. The suit was brought to quiet the respondent's possession and title to lot number three in block one hundred and eighty-seven, in the city of Portland, against Matthew Brady and George Brady, who sues by his guardian, James Wilson. The appeal is taken alone by Matthew Brady. The parties all claim to derive title from one Bernard Brady, late of Multnomah county, deceased.

The facts established by the evidence are as follows:

1. That Bernard Brady made his will on the twenty-ninth day of October, 1862, and died at the city of Portland, Oregon, on the thirty-first day of October, 1862. It was admitted to probate in the county court of the county of Multnomah on the seventh day of November, 1862, and his estate has been duly administered upon.

2. The fourth clause of his will is, so far as is material, as follows: "As also a certain parcel of ground or lots in the city of Portland, and numbered as follows, to wit: No. block, 187, one hundred and eighty-seven, lot No. (2) two, I bequeath to Margaret McGill."

3. Sixth clause of will: "I also bequeath to my sister Esther Brady, that lot or parcel of ground, in the city of Portland, as here described, lot No. (1) one, in block (187) one hundred and eighty-seven—otherwise its value."

4. Twelfth clause of will: "The remainder of my estate and effects I bequeath to be equally divided between my

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brother, Matthew Brady, and Margaret McGill, and George A. Brady, orphan child of John Brady, deceased."

5. That Bernard Brady did not, at the time he made his will or died, or ever, own, or claim to own, or have any interest in, lots 1 and 2 in block 187, or either of them, but did, at the time he made his will, and when he died, own lots 3 and 4 in the same block by an equitable title derived from Jasper W. Johnson, under an instrument in writing, dated October 4, 1862, executed and acknowledged by the said Johnson and his wife, and in all respects a perfect deed, except that no seals were affixed to the grantors' signatures.

6. That, on the nineteenth day of March, 1878—during the pendency of this suit—for a nominal consideration, and on purpose to correct the alleged error of the want of a seal in the preceding deed, and upon the representation of Matthew Brady, this defendant and appellant, that he, the said Matthew Brady, was the sole heir of the said Bernard Brady, and the *bona fide* owner of the premises, the said Johnson and his wife duly executed a good and sufficient confirmatory deed to the said Matthew Brady of said lots 3 and 4 in said block 187.

7. The respondent introduced in evidence a power of attorney, executed in Ireland by Esther Brennan and her husband, John Brennan, to Margaret McGill; and a deed from Esther Brennan and John Brennan, her husband, by Margaret McGill, attorney in fact to James N. Lyon, and a chain of conveyances from Lyon to respondent, and offered in evidence a certified copy of the will of Bernard Brady, and probate thereof.

One of the witnesses signs by making his mark. The signature of Bernard Brady and the attestation of the witnesses are as follows:

Witness	His
The signature,	BERNARD X BRADY.
PATRICK MACKEN.	Mark.

The above instrument of three pages was now here subscribed by Bernard Brady to be his last will and testament, and he then acknowledged to each of us that he had sub-

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scribed the same, and we, at his request, signed our names hereto as attesting witnesses.

PATRICK BRADY,

Residing at Portland, Or.

His

DANIEL X MCGILL,

Mark.

Residing at Portland, Or.

Witness to this will and testament of Bernard Brady,

PATRICK MACKEN.

It is claimed by the appellant that the will of Bernard Brady is void, because it appears that he signed it by making his mark, and that some other person signed his name to the same without stating that he signed the testator's name at his request, and as a witness, as required by the statute of Oregon. The manner in which the will was signed by the testator, and attested by the subscribing witnesses, was in substantial compliance with the requirements of the statute in that respect, as was held by this court in *Pool v. Buffum* (3 Or. 438), to which we refer as decisive of this point.

But it is further claimed that the devise is void on account of a false description of the lots intended to be devised, and that no parol evidence is admissible in aid of its construction. While it is conceded to be the general rule, that oral evidence is not admissible to explain or vary the words of a written instrument, there are so many exceptions and qualifications of the rule, that no case is tried where the force, operation, and construction of a written instrument are concerned, that oral evidence is not received in aid of its construction. The rule excluding oral proof in explanation of written instruments, applies to the language of the instrument, and not to its import or construction. (1 Greenleaf Ev. sec. 277.) But the written instrument "may be read in the light of surrounding circumstances," in order to more perfectly understand its true meaning.

It is very common "to receive oral proof to show that language was used in a peculiar sense, or that one term was used for another; or that an essential term, to make the defi-

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nition perfect, was wholly omitted or erroneously stated. These corrections are every day made by courts in fixing the construction of wills and other written instruments, by aid of extraneous evidence in regard to the state and condition of the subject-matter of the devise or of the devisee, in regard to one or the other."

Wills are frequently made during the last sickness of testators, and they too often depend wholly upon memory for description of their lands, and in consequence they are liable to great indefiniteness and occasional error. And on looking into the many cases decided, we find that courts have for a long period of years been compelled to deal with these descriptions in a very lenient manner, in order to reach the true intent of the testator "where that seemed practicable by the act of construction, and by the admission of oral evidence to remove latent ambiguities."

Mr. Redfield says: "One rule upon the subject is so thoroughly established as to have become a maxim in the law, *Falsa demonstratio non nocet*. The practical meaning of which is, that however many errors there may be in description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show with reasonable certainty what was intended." (Redfield's American cases upon the law of Wills, 544; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. Sur. R. 144; *Jackson v. Sill*, 11 Johns. 201-218; 1 Redfield on Wills, 580.)

Then we apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2 in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected. The devise is the same as if the numbers of the lots had not been mentioned at all or

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had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to wit: "A certain parcel of ground or lots in the city of Portland in block No. 187;" also "that lot or parcel of ground in the city of Portland in block 187." And by thus placing ourselves in the position of the testator, by oral evidence, at the time of the execution of his will, we find that there were two lots or parcels of ground in the city of Portland, and in block 187, belonging to the testator at that time and also at the time of his death. This renders the devise entirely certain from the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them. The testator could not have intended to devise lots to which he never had any title, but must have intended to devise those which did belong to him. He had two just such lots or pieces of land as he names, and every way described as these are, with the single exception of this one false particular, and this is the very kind of case to which the maxim *falsa demonstratio non nocet* applies. (*Allen v. Lyons*, 2 Wash. C. C. 475; *Winckley v. Kaine*, 32 N. H. 288; *Myers v. Riggs*, 20 Mo. 239; *The Domestic and Foreign Missionary Society's Appeal*, 30 Penn. St. 425; *Button v. The American Tract Society*, 23 Vt. 336.) In *Winckley v. Kaine*, *supra*, the devise was of "thirty-six acres, more or less, of lot thirty-seven in the second division of Barnstead," and it appearing that there was no such lot in that division, but that the testator owned land in lot ninety-seven in that division, it was held to pass under the will. In *Allen v. Lyons*, *supra*, the devise was of a house and lot in Fourth street, Philadelphia. But it appeared on oral proof admitted by the court that the testator had no such property in Fourth street, but did own a house and lot in Third street, and it was held to pass under the devise.

While it is admitted that the court might go thus far in safety under the authorities, it is claimed that the devise can not be sustained because it can not be ascertained from the language of the will which lot the testator intended to

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give to Esther, and which to Margaret. To this we answer that it does appear that he intended to give each one a lot, and the evidence disclosing that there was no particular difference in the situation and relative value of the lots, it may be presumed that they took them in common; that each was to have an interest in both lots. And the sisters having amicably arranged between themselves as to which lot each one would take, we are unable to see which interest the appellant had in that matter.

But it is further claimed that respondent has failed to show title to any interest which Esther Brennan might have had in the premises described in the complaint, for the reason that she, being a married woman, could not convey real property by an attorney in fact. It appears in evidence that a power of attorney was executed in Ireland by Esther Brennan and John Brennan her husband, to Margaret McGill, fully authorizing her in their names to convey her title to the property in question. Said power of attorney being duly acknowledged by Esther Brennan and her husband before an officer with authority to take such acknowledgments, also a deed from Esther Brennan, and John Brennan, her husband, executed in their names by the said Margaret McGill, their attorney in fact, to James N. Lyons, which deed constitutes a link in the chain of respondent's title. The question presented is that Esther Brennan, being a married woman, could not convey her interest in the property through an attorney, notwithstanding her husband joined with her in the execution of such power. Misc. Laws, p. 515, c. 6, tit. 1, sec. 2, provides that "a husband and wife may by their joint deed convey the real estate of the wife in like manner as she might do by her separate deed, if she were unmarried."

The California statute contains a section like this, and the courts there hold that a married woman can not invest another with power to convey any interest she may have in real estate in the absence of any statute to that effect. Section fifteen of our statute provides that "when any married woman, not residing in this state, shall join with her husband in any conveyance of real estate situated within this

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state, the conveyance shall have the same effect as if she were *sole*, and the acknowledgment or proof of the execution of such conveyance by her may be the same as if she were *sole*." The California statute had no such section as this.

Thus it will be seen that under this section Esther Brennan and her husband, residing out of the state, could have joined in the execution of a deed to the property in question, which would have been sufficient under the law to convey any right she had therein. In this state there is no statute prohibiting a married woman with investing another with power to convey any interest she may have in real estate; and we are unable to see any good reason why the section above referred to should be construed to have that effect; and especially when we take into consideration that the tendency of modern legislation and modern decisions is to remove the disabilities imposed by the common law upon married women.

Entertaining the views herein expressed, it follows that the decree of the court below should be affirmed.

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9	309
17	212
20*	846
8	316
28	495

S. D. NORTHCUT, S. T. NORTHCUT, AND WM. W. NORTHCUT, APPELLANTS, v. LOUIS LEMERY, RESPONDENT.

SUMMONS—SERVICE BY PUBLICATION—RECITALS IN DECREE.—Where the statute in divorce cases required a summons on a non-resident defendant to be published four weeks, as in the act of January 17, 1854, and a decree granting a divorce under it contained a recital in the following words, "And it further appearing that the defendant had been served by publication as required by law," jurisdiction over the person of the defendant will not be presumed, it appearing by the filing on the complaint that four weeks could not intervene between the time of such filing and the rendition of the decree.

RECORD MUST SHOW STRICT COMPLIANCE—SPECIAL POWER.—Where a court of general jurisdiction exercises a special power conferred upon it by statute, and not according to the course of the common law, it must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself.

APPEAL from Marion County.

Statement of Facts.

On the twenty-third day of June, 1851, Hubert Petit and Emerance Petit, his wife, commenced to reside upon and cultivate a certain tract of land containing one hundred and ninety-five acres, and continued to reside thereon and cultivate the same for four years, as required by the donation land law of Oregon. The north half of the claim was set apart to the said Emerance, and the south half to the said Hubert Petit, and a patent was afterwards issued to them. On the second day of September, 1857, Hubert Petit filed a petition for a divorce from his wife, and at the September term, 1857, of the district court of the first judicial district of Oregon territory, a divorce was granted by that court, although the decree dissolving the marriage was not then entered of record. Afterwards, at the September term, 1859, the decree was entered on the journal of the court, *nunc pro tunc*, as follows:

“HUBERT PETIT v. EMERANCE PETIT—Divorce.

“Now on this day, it appearing that a decree had heretofore been rendered in this cause, at the September term thereof, 1857, and that said decree had not been entered, and it further appearing that defendant had been served by publication, as required by law; it is ordered that said decree be entered *nunc pro tunc*; and it is therefore ordered that the bonds of matrimony heretofore existing between the parties be dissolved, and that Hubert Petit have the exclusive custody of the two children, the issue of said marriage, named Delia and Josephine, and that the north half of the land claim of said parties, being the part of said claim set apart to the said defendant by the surveyor-general, be decreed to, and the right and title thereof be vested in the said children, and plaintiff pay costs.”

On the trial, the appellants read in evidence the record in the foregoing divorce suit. They then read in evidence a certified copy of the proceedings in the probate court authorizing and directing a sale of the north half of said donation land claim by the guardian of the said children, Delia and Josephine, and the sale of the same by said guardian to

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S. T. Northcut, one of the appellants. They then read in evidence a quitclaim deed dated the fourteenth day of October, 1875, whereby Hubert Petit conveyed all his right, title, and interest in the said donation land claim to the appellants, S. D. Northcut, S. T. Northcut, and W. W. Northcut. No other evidence of title was offered in evidence by the appellants.

The respondent then offered in evidence a transcript of the judgment roll in an action commenced in the circuit court for Marion county on the twenty-seventh day of July, 1871, by *Emerance Groslouis v. S. T. Northcut*, one of the appellants, for the recovery of the land described in the complaint, wherein the said Emerance was adjudged to be the owner of the land in controversy. They also offered parol evidence to prove that Emerance Groslouis was formerly the wife of Hubert Petit, from whom he obtained a divorce, and that by a deed from her the title became vested in the respondent.

Knight and Lord, for appellants.

B. F. Bonham, W. W. Thayer, and G. W. Lawson, for respondent.

By the Court, KELLY, C. J.:

This is an action of ejectment brought to recover a tract of land known as the north half of the donation claim of Hubert Petit and Emerance Petit, his wife, being that portion of it set apart by the surveyor-general of Oregon, to the said Emerance, to whom a patent was issued by the United States. S. T. Northcut, one of the appellants, formerly claimed the land, deriving his title under a decree of divorce made at the September term, 1857, of the district court of Oregon territory for Marion county, wherein the court decreed that the north half of the said land claim, which belonged to Emerance Petit, should be vested in Delia and Josephine, the minor children of the parties in the divorce suit; and a subsequent sale of the same land to him by the guardian of said minor children. Under the guardian's sale he obtained possession of the land.

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In 1871 an action of ejectment was commenced in the circuit court for Marion county, by Emerance Groslouis (formerly Emerance Petit), against S. T. Northcut, to recover this land, and it was adjudged by the court that she was the owner of it. (*Groslouis v. Northcut*, 3 Or. 394.) The court held in that case, that inasmuch as the pleadings in the divorce made no reference to the property of Emerance Petit, the territorial district court could not, by its decree, transfer the title to the land from her to her children, under the eighth section of the act of January 17, 1854, relating to divorce and alimony. (Or. Stat. 540.) This judgment was afterwards affirmed by the supreme court at the January term, 1873. On the fourteenth of October, 1875, the appellants obtained a quitclaim deed from Hubert Petit, conveying to them his right, title, and interest in the said donation land claim.

The position now taken by the appellants is, that inasmuch as the court decided in the case of *Groslouis v. Northcut* that the decree of divorce in *Petit v. Petit* did not dispose of the property of Emerance Petit, the legal effect of the decree was to vest the title to the same in her husband, because the wife was the guilty party in the divorce suit. In support of this position appellant's counsel refer to a clause in the eighth section of the act of January 17, 1854, as follows: "And all property and pecuniary rights and interest, and all rights touching the children, their custody and guardianship, not otherwise disposed of or regulated by the order of the court, shall, by such divorce, be divested out of the guilty party and vested in the party at whose instance the divorce was granted." They contend that by operation of the statute just quoted, Hubert Petit became the owner of his divorced wife's property, including the land in controversy, and that by his deed to them they now have the legal title to it.

The case was tried in the court below without the intervention of a jury, and wholly upon record testimony, which is now before us. And without going into an examination, or giving an opinion upon the many intricate and important questions presented in the argument of counsel on both

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sides, it is sufficient for us to say that the appellants must recover in this action, if at all, upon the strength of their own title. And this title, by the very records adduced to support it, is shown, we think, to be fatally defective. As one of the muniments of their title they produce in evidence and rely upon the decree of divorce granted by the district court at the September term in 1857, in the case of *Hubert Petit v. Emerance Petit*. The decree was made at that term of the court, but through some inadvertence it was not then entered of record, and not until the September term, 1859, two years afterwards, when it was entered *nunc pro tunc* as of September term, 1857.

A certified copy of the entire record shows that the petition for a divorce sworn to on the second day of September, 1857, and filed on that day, and the decree entered *nunc pro tunc* are all and the only records in the case. There, is no evidence of the service of a summons upon the defendant, Emerance Petit, other than the recital in the decree itself, which is as follows: "And it further appearing that defendant had been served by publication as required by law." The law then in force governing the mode of service of a summons in cases of divorce was as follows:

"Sec. 6. If the defendant is not a resident of the territory, or can not for any cause be personally summoned, the court or judge in vacation may order notice of the pendency of the suit to be given, in such manner and during such time as shall appear most likely to convey a knowledge thereof to the defendant, without undue expense or delay; and if no such order be made, it shall be sufficient to publish such notice in a weekly newspaper printed in or nearest to the county in which the suit is pending, four weeks in succession, and if the defendant fail to appear and make defense, at the first term after such notice, or after ten days' personal service of summons, the evidence may be heard, and the cause decided at that term, or compulsory process may be had to obtain an appearance or answer, if it be necessary to the disposition of property or of children."

It will be perceived that there were two ways of serving notice of the pendency of a suit for divorce upon a non-

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resident defendant, or one upon whom personal service could not be made. One was by an order of the court or judge, that the notice should be given in such manner as would most likely convey a knowledge of the pending suit to the defendant, and save the parties from any unnecessary expense of publication. The other mode of service, when no such order existed, was by publication in a weekly newspaper printed in or near the county in which the suit was pending, for four weeks in succession.

In the case of *Petit v. Petit*, the record recites the manner in which service was made, that is, "by publication as required by law," and there is, therefore, no presumption raised that it was made in pursuance of any order of the court or judge. Where the record discloses a particular mode adopted to acquire jurisdiction over the person of a defendant, if that is not sufficient to confer the jurisdiction, it will not be presumed that any other mode was adopted, or that jurisdiction was acquired in any other way, unless there is something further in the record on which to base such presumption. It may be conceded that where the record is silent as to the mode of acquiring jurisdiction, it will be presumed. But where the record shows the mode resorted to, there is nothing either in authority or reason that will warrant the presumption that another mode was resorted to. That would be presuming against the plain implication of the record. (*Ely v. Tallman*, 14 Wis. 30.)

There having been no other mode of service in the divorce case than the alleged publication, was that a sufficient compliance with the requirements of the law to give the court jurisdiction over the person of the defendant? The statute required four weeks' publication. The petition for a divorce was filed on the second day of September, 1857, and only four weeks of that month remained. Even if the first publication had been made on the day the petition was filed (and it could not have been before), the service would not have been complete before the first day of October. Section 6 of the act before quoted, provides that "if the defendant fail to appear and make defense at the first term

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after such notice * * * the evidence may be heard and the cause decided at that term."

It is true the decree of the court recites "that the defendant had been served by publication as required by law," and it is well settled that a court of general jurisdiction proceeding within the scope of its powers will be presumed to have jurisdiction to give the judgments and decrees it renders until the contrary appears. And it is equally well settled in this state that where there is a recital in a judgment of due service of a summons upon a defendant, nothing short of a clear contradiction in the judgment roll will affect the recital. (*Ladd v. Higley*, 5 Or. 296.) But where a decree contains a recital that due service was made and the return of the sheriff purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. (*Heatherly v. Hadley*, 4 Or. 2.)

Although the decree which granted a divorce to Hubert Petit, recited a service by publication of the notice, yet it is manifestly an impossibility that it could have been published four weeks before the first day of October, when the first publication was on or after the second day of September. It therefore necessarily follows, that the decree of divorce granted at the September term was made when the court had no jurisdiction of the person of Emerance Petit, and no principle of law is more clearly settled than that a judgment or decree rendered by a court which has no jurisdiction of the subject-matter of the suit, or of the person of the defendant, is void, and that it will be so treated whenever it is drawn in question. (*Hunsaker v. Coffin*, 2 Or. 107.)

There is another reason why the decree made in the divorce suit can not be upheld. The court which rendered it, although one of general jurisdiction, was then exercising a special power conferred upon it by statute, and not according to the course of the common law. And in such cases, even a court of general jurisdiction must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself; and

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unless it does so appear, no presumption will be indulged to sustain the validity of its judgments or decrees. (*Heathery v. Hadley*, 4 Or. 1; *Galpin v. Page*, 18 Wallace, 350; *Commonwealth v. Blood*, 97 Mass. 540; 1 Smith's Leading Cases, 1116.) In England the ecclesiastical courts only, had jurisdiction in cases of divorce. They were unknown to the courts of common law, and it is by statutory enactment only that our courts of general jurisdiction take cognizance of such cases. And the service of a notice to the defendant to appear and answer, made by publication instead of personal service, is also in derogation of the common law mode of service. It is to cases of this kind that the language of Mr. Justice Field, in the case of *Galpin v. Page*, applies: "Where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class of cases not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear upon the record."

The service of the notice upon the defendant, Emerance Petit, having been made by publication, the record should disclose affirmatively how and when and where it was published, so that an inspection of it would clearly show that every requirement of the statute had been strictly complied with. Failing to do this, the decree amounts to nothing, and it can not be invoked to sustain the appellants' cause of action, and as this decree was and is the foundation of their title, that necessarily fails also. It is needless, therefore, to pass upon the other points of error raised in the record, and the judgment of the court below will be affirmed.

Mr. Justice BOISE dissented.

Opinion of the Court—Prim, J.

**JOHN A. CRAWFORD, APPELLANT, *v.* S. H. ROBERTS,
RESPONDENT.**

PLEADING—STATUTE OF LIMITATIONS OF ANOTHER STATE.—An answer which alleges that the note on which the action is based was executed in the State of California, and that the maker thereof was a resident of said state at the time of its execution, and has been ever since, is insufficient. Under section 26 of the code, in pleading the statute of limitation in force in another state, in bar of the action, it must be averred that the cause of action arose in that state, and was between non-residents of this state.

PROMISSORY NOTE—RELEASE OF ONE JOINT MAKER.—A release of one joint maker of a joint and several promissory note, by the holder thereof, operates as a discharge of all the joint parties to said note.

AFFIDAVIT FOR ATTACHMENT—ULTIMATE FACTS ONLY TO BE STATED.—Under the act of 1876, an affidavit for an attachment need not state the probative facts out of which the indebtedness of defendant arose, but it is sufficient if the ultimate facts required by the statute be shown as the basis of the writ.

APPEAL from Linn County. The facts are stated in the opinion.

R. S. Strahan, for appellant.

Humphrey & Wolverton, for respondent.

By the Court, PRIM, J.:

This was a several action against the respondent upon a joint and several promissory note, made, executed, and delivered by him and B. R. Freeland to the appellant, at San Francisco, California, on May 1, 1869.

To this cause of action the respondent undertook to set up two defenses: 1. That said note was executed and made payable in the state of California; that the respondent was, at the time of the making of said note, a resident thereof, and has been ever since, and now is a resident of said state, and the statute of limitation of the state of California is there set up in bar of said cause of action, to wit, four years, the statute being set out in proper form; 2. The second defense is that the respondent was discharged from his liability upon said note, on the ground that the appellant, for a valuable consideration, prior to the commencement of the

8	324
11	236
14	19
21	306
3*	825
12*	57
28*	9

8	324
23	17
24	248
33*	880
35*	178
8	324
33	446
48	606

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action, had agreed to discharge and did discharge the said Freeland, his co-joint maker, from all liability upon said note.

Both of these defenses were demurred to by the appellant, and said demurrer being overruled by the court, and the appellant electing to stand upon his demurrer, the court rendered judgment against him for costs, from which he has appealed to this court. A motion was also interposed by the respondent in the court below, to discharge the attachment, upon the ground of the insufficiency of the affidavit to authorize the issuance of the writ, which was sustained by the court.

The overruling of the demurrer to these defenses and the sustaining of this motion to dissolve the attachment, are the grounds of error complained of by the appellant. The first separate answer, we think, fails to contain facts sufficient in law to constitute a defense to the action, in this—it fails to show that the cause of action arose between non-residents of this state, which is an essential fact, that must be alleged in order to show that the action was barred in the state of California.

It is alleged that the note was executed in state of California and that the respondent was resident of said state, has been ever since, and now is, but it fails to allege that the appellant is now or ever was a resident of said state. And in this it is defective, and insufficient to bring the defense within the provisions of sec. 26, p. 109 of the Code. That section is in these words: "When the cause of action has arisen in another state * * * between non-residents of this state, and by the laws of the state where the cause of action arose an action can not be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state." The demurrer of appellant to this defense we think was improperly overruled.

The facts alleged in the second separate answer we think are sufficient to constitute a defense to this action, and that the demurrer to said defense was properly overruled by the court. It is a well-settled rule of elementary law that "a release of one joint maker by the holder * * * will

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discharge all the joint parties, for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such case." (Story on Promissory Notes, sec. 425; Chitty on Bills, 314; 18 Pick. 414.)

The only remaining ground of error is based upon the ruling of the court in sustaining the motion of respondent to dissolve the attachment. This motion was based upon the insufficiency of the affidavit to authorize the clerk to issue the writ, and the court below entertaining this view, dismissed the attachment. The affidavit is in the language of the statute without undertaking to set out the probative facts necessary to establish the ultimate facts required by the statute to be shown as the basis of the writ. The present statute under which the attachment was issued was taken from the California practice act, and was adopted in 1876, and it is a familiar rule of construction that the legislature, in adopting the statute of another state, adopts along with it the judicial construction of that state, as understood at the time.

In *Wheeler v. Farmer*, 38 Cal. 215, the supreme court of California had the precise question presented here before it, and Justice Sprague, in passing upon the question, said: "Under our statute, it is the duty of the court in which the suit is commenced to issue the writ upon the filing by the plaintiff of an affidavit stating the ultimate facts in the language of the statute, together with an undertaking in amount and form as defined by statute. Upon such compliance with the statute, the plaintiff demands as a right the issuance of the writ, and in issuing the writ the clerk has no discretionary power. He but performs a ministerial duty in obedience to a plain statutory mandate." He then proceeds to comment on the New York authorities cited, holding that they are inapplicable to their statute. That in New York, to authorize the issuance of the writ, both under the revised statutes and the code, a state of facts had to be shown to the satisfaction of a judicial officer to whom the application was made. And in *Weaver v. Hayward*, 41 Cal. 117, on the same question being presented to the court, it was held that "the affidavit for an attachment need not

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state the facts out of which the indebtedness of the defendant to the plaintiff arose." We think the court erred in dissolving the attachment on this ground.

The judgment of the court below is affirmed as to the overruling of the demurrer to second defense, and reversed as to first defense. It is therefore ordered that this cause be remanded to the court below for further proceedings.

8 327
9 499

JAMES S. COOPER, RESPONDENT, v. JOHN W. McGREW ET AL., APPELLANTS.

8 327
139 550
89 552

COMPLAINT—ACTION ON UNDERTAKING IN REPLEVIN.—In an action brought upon an undertaking in replevin, facts were alleged showing the commencement of the action, the undertaking for the immediate delivery of the property in controversy, its delivery, and the failure to prosecute the action of replevin, or redeliver the property. The complaint then alleges, that by reason of the premises aforesaid, said undertaking has become forfeited to this plaintiff, and an action has accrued to this plaintiff against the said defendants, jointly and severally, and he hath right to demand and have from the said defendants, the said sum of one thousand two hundred dollars. *Held*, That the facts so stated are sufficient to constitute a cause of action.

LANDLORD AND TENANT—TENANCY IN CROP.—Where a landlord leases land and reserves a part of the crop as rent, the tenant can not sell or dispose of the part so reserved. The landlord and tenant are tenants in relation to such crop.

APPEAL from Polk County.

This is an action brought upon an undertaking in an action of replevin, heretofore brought by the appellant McGrew against this respondent, for the recovery of certain wheat and oats. The undertaking in the replevin action was executed by McGrew, with Townsend and Logan as sureties, and was for the immediate delivery of the property sued for, which delivery was had. Thereafter the defendant in the replevin, the respondent here, had a judgment of nonsuit; but the grain, which was the subject of the controversy, was never redelivered.

The additional facts are stated in the opinion.

R. S. Strahan and J. J. Daly, for appellants.

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Butler & Truitt, and Tilmon Ford, for respondent.

By the Court, BOISE, J.:

It is claimed in this case, by the appellant, that the complaint of the plaintiff does not state facts sufficient to constitute a cause of action. The complaint, in setting out the proceedings in the replevin action, shows what property was taken in that action, and the termination of the action in favor of the defendant therein, who is the plaintiff in this action. This termination of the action to recover the property shows a breach of the undertaking which the plaintiff in this action alleges in terms. He then alleges that by reason of such forfeiture, and because the defendant still retains the possession of said property, or its value, and refuses to deliver to plaintiff either the property or its value, he is entitled to recover of the defendant the sum of one thousand two hundred dollars, which he says is justly due and owing to him, by reason of such forfeiture, etc.

This complaint is not perfect in form, but taken all together, it shows the plaintiff's cause of action, and is, we think, sufficient, for the facts are in it out of which the plaintiff's cause of action arises. The breach of the undertaking gives the plaintiff a cause of action for nominal damages, and as it appears what property was taken, and as the plaintiff claims that he is entitled to recover for such breach and taking and retaining of the property, one thousand two hundred dollars, the defendant is fully advised by the complaint, of the plaintiff's claim. (Bliss on Code, Pleading, 437; Morris on Replevin, 259.) It is also claimed that the circuit court erred in giving the instruction to the jury which is set out in the bill of exceptions. In the bill of exceptions it appears that the plaintiff, to support the issues on his part, introduced evidence tending to show that he had leased the premises upon which the wheat and oats grow, which are the subject of this controversy, to one John Chandler, and that by the contract between them, Cooper was to receive the amount of five hundred bushels of wheat for the land, to be taken out of the first wheat threshed on the premises, and also produced a certain bill

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of sale of Chandler's interest in said wheat and oats, a copy of which is hereto attached marked exhibit "A," and made a part of this bill of exceptions, and hereupon plaintiff rested his cause.

The defendant, to support the issues, on his part introduced a mortgage on the said crop by said Chandler to said defendant, executed on the sixteenth day of May, 1878, a copy of which is hereto attached, marked exhibit "B," and made a part of the bill of exceptions; and also offered evidence tending to show that he had taken possession of the property described in said mortgage on or about the sixteenth day of August, 1878; and also the pleadings and proceedings in the action by the said John W. McGrew against the said J. S. Cooper, and the value of the property in dispute, and rested. After argument of counsel pro and con, the court, among other things, instructed the jury substantially as follows, to wit: "If the jury believe from the evidence that by the contract between Chandler and plaintiff, Cooper, in regard to the letting of the land, plaintiff was to receive five hundred bushels of wheat from the crop raised on the land, the first five hundred bushels threshed, for the use of the ground, or that Chandler was to have all the crop over and above the five hundred bushels to pay him for his work; the plaintiff's five hundred bushels to be left on the place and received there by him; then the plaintiff and Chandler were tenants in common, and neither could sell any more than his own interest in the crop, and McGrew only took the interest of Chandler, what there might be over and above five hundred bushels, by his purchase or mortgage." To which instruction and charge the defendant, by his counsel, then and there excepted.

Exhibit "A" referred to, purports to convey and release unto the Coopers all the right, title, and interest which the said Chandler had in the premises and crops on the twenty-third day of August, 1878, and nothing more.

The issue left to the jury to which this instruction is directed, was whether or not Cooper had leased the land and reserved as rent therefor a part of the crop raised; if the jury found that the lease was on this condition as to rent,

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we think that the lessor has a right to retain the rent which was on the land in his possession, and that it was not the subject of sale by the tenant. (See the case of *Moulton v. Robinson*, 7 Foster (27 N. H.) 550.) It is held that "it could never be the intention or consent of any judicious landlord, nor the wish of any honest tenant, that the farmer should have no security for his share of the profits but the honesty of his tenant; nor that the tenant should have it in his power to sell the entire crop, or subject it to the payment of his debts; when in equity and justice neither he nor his creditors have any claim to more than an undivided share of it.

The policy of the law is to give such effect to the contract of the parties as will carry out their intentions, whenever it can be done without hazard to the rights of others. And the landlord, having reserved a share of the crop, is as to that share a tenant in common with the tenant, and this is not inconsistent with the possession of the tenant in his capacity of cultivating the land and disposing of his share of the crop. The tenant can not sell or dispose of the share of the landlord, nor can such share be levied on for the debts of the tenant. It seems to us that this is a just rule to be applied in such cases, as the rights of the landlord and tenant are both secured, and the rights of third parties are not unjustly affected, for the creditors of the tenant should have no claim on the crop greater than the ownership of the tenant in it. (10 Pick. 205; 15 Barb. 599.)

We have disposed of the questions in this case, and find no substantial error, and the judgment of the circuit court will be affirmed.

L. ELKINS, APPELLANT, v. G. PARRISH, RESPONDENT.

SLIGHT EVIDENCE ADMISSIBLE.—Where there are several issues of fact made by the pleadings to be tried by a jury, it is not error to admit any evidence, however slight, which tends to prove any fact so put in issue.

APPEAL from Linn County.

This action is founded on an instrument in writing whereby the respondent agreed to deliver to the appellant a

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sufficient number of American brood mares and colts at their actual cash value to amount to one thousand dollars, at Wain Claypool's, on the Upper Ochoco, in Wasco county, Oregon, on the first day of October, 1878. It is alleged on the part of the appellant that the respondent failed to deliver the mares and colts at the place named, to the appellant's damage, etc.

The answer of the respondent denies the alleged failure, and alleges that on the first of October, 1878, the parties entered into another agreement whereby the place of delivery of the mares was changed to Henry Clicks', on Willow creek in Wasco county; that the respondent was ready to comply with the agreement at the appointed time, but that the appellant was not present or ready to receive the property. The reply puts in issue the material allegations in the answer. The respondent had a verdict and judgment. The errors assigned are as follows: 1. The court erred in allowing respondent's counsel to ask the witness, G. Parrish, the following questions: "State what kind of a country it was where the horses were to be delivered, and what knowledge Mr. Elkins had of the country at the time the contract was made." 2. "What is the country there used for, and how is it used?" 3. "State whether the country is fenced at the place where the horses were to be delivered, and where they were kept." 4. "State what knowledge Elkins had of the country at the time the contract was made as to how stock was kept there?"

Weatherford & Blackburn, Powell & Bilyeu, for appellant.

L. Flinn, R. S. Strahan, L. Bilyeu, for respondent.

By the Court, PRIM, J.:

It is claimed by appellant that the court erred in allowing certain questions to be asked and answered by the respondent, as follows:

1. "State what kind of country it was where the horses were to be delivered, and what knowledge Mr. Elkins had of the country at the time the contract was made?" Answer. "It is a valley, timberless country, with very little water,

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but covered with grass; it is not suitable for farming purposes but suitable only for cattle, except in the lower part of the valley; there are some few farms and houses. Mr. Elkins had no knowledge of the Willow creek country at that time, at least he told me he had not."

2. "What is the country there used for, and how is it used?" Answer. "For the purpose of raising and pasturing stock; the stock are turned loose upon the range."

3. "State whether the country is fenced at the place where the horses were to be delivered, and where they were kept." Answer. "It is fenced where the horses were to be delivered, but not where they were kept on the range."

4. "State what knowledge Elkins had of the country at the time the contract was made as to how stock were kept there?" Answer. "I think that he knew that stock were kept there loose on the range, as stock was generally kept in that country.

By reference to the pleadings it will be seen that the execution of the written agreement upon which the action is based is admitted in the answer of respondent, but that every allegation of default is denied. And in the separate answer it is alleged that by subsequent parol agreement, the place of delivery specified in the written agreement was waived and changed to Henry Clicks', in Willow creek, Wasco county, Oregon. And that on the said first day of October, 1878, the said respondent was at the said Henry Clicks' on said Willow creek, and was then and there able, ready, and willing to deliver said horses, mares, and colts to the said appellant, but that he was not there ready or willing to receive the same. And then it is further averred, by way of counter claim, that respondent ever since the first day of October, 1878, has constantly kept the said mares and colts for the appellant, and furnished them feed and pasture and the necessary care and attention, and that the same is of the reasonable value of three hundred dollars.

All these allegations of new matter having been put in issue by the replication, we think the questions to which objections are made were admissible as tending to elicit facts which tend to prove the counter-claim of the respond-

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ent. If the country was unfenced and stock was allowed to run loose on the range, and a herder had to be kept with them, it was more expensive to keep them ready for delivery than it would have been if the stock had been kept in inclosed pastures. And we think this evidence was properly submitted to the consideration of the jury, as tending to elicit facts tending to prove the counter-claim of the respondent.

It appears from the bill of exceptions that the court, in passing upon the admissibility of this evidence, assigned the following reason for its admission: "Because it may be presumed that the parties had the nature of the country or place where the contract was by its terms to be executed, in view at the time the contract was made, and for the reason that the circumstances and condition of the subject of the contract, and of time and place when and where it was to be executed, must be considered in construing the contract.

This is also assigned as error, but no exception having been taken to it at the time, it can not be reviewed in this court.

Judgment of the court below affirmed.

G. W. MILLER, PLAINTIFF AND APPELLANT, *v.* W. N. VAUGHN, DEFENDANT AND RESPONDENT.

WATER-DITCH—RIGHT OF WAY.—Where the owner of a tract of land granted to another the right of way for a mill-race, to conduct water from a stream above the land to a mill below it, the grantee did not thereby become entitled to use and appropriate the water of a small stream on the land of the grantor, which ran across the line of the race.

IDEM.—A grant of the right of way over land for a mill-race is merely an easement, and not a right to the land over which the race is constructed, nor to water flowing over the land. Such rights remain with the grantor, and no express reservation is necessary in the deed granting the right of way.

APPEAL from Tillamook County.

On the sixteenth day of August, 1872, the respondent sold and conveyed to W. T. Baxter five acres of land for a

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mill-site, and on the same day, by a separate deed, conveyed to him a right of way across his land for a mill-race, for the purpose of floating logs and supplying the mill with water, as follows:

“This indenture, made the sixteenth day of August, 1872, between Warren N. Vaughn, of the county of Tillamook and state of Oregon, of the first part, and William T. Baxter, of the same place, of the second part. Whereas, the said parties, at the time of the sealing and delivering of these presents, are rightfully seised in fee a certain piece of land with the appurtenances, in the county of Tillamook aforesaid; and, whereas there is in course of construction a race upon a certain stream of water known as the Kilchis river, the said party of the second part. Now, therefore, know all men by these presents, that I, Warren N. Vaughn, in pursuance of said agreement, and in consideration of the sum of one dollar to me paid by the party of the second part, do hereby give, grant, sell, and convey unto the said William T. Baxter and his heirs and assigns, a right of way in and over the land, the strip of land being of the width of one rod, and running from the east side of said Vaughn's place, thence westerly through said place to the saw-mill of said party of the second part, and the way is and shall forever be of said dimensions; and also, for the consideration above mentioned, the said Warren N. Vaughn do hereby give, grant, sell, and convey to the said William T. Baxter, his heirs and assigns, the right to enter into the said strip of land, to be used as a passage-way as aforesaid, for the purpose of floating logs and supplying water to said mill. The considerations of the above grant are as follows, the parties agreeing before the delivery of this deed: the said Baxter agrees where the race enters and leaves the inclosure of said Vaughn's place, he will construct, or cause to be constructed, a good gate, for the purpose of preventing stock from entering the above-mentioned premises, and keep the same in good repair; the said Vaughn reserves the right of putting fences or bridges across the said race at any point he deems necessary.”

At the date of the deed, Baxter had already commenced

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the construction of the mill-race from a point on Kilchis river about two and a half miles above the mill, towards the land of Vaughn. The object in making it was to supply the mill with water from Kilchis river, and to float logs down to the saw-mill, and this could only be done by digging the race across the land of respondent, which was done after the right of way was obtained. Two small streams of water on the land of respondent ran across the line of the mill-race, one of which is known as Vaughn creek, and since its completion, both of them flow into it. After the race was completed, a dam was made at the head of it, to turn the water from Kilchis river into it. The dam only remained a short time, when it was washed away, and since then the mill has been supplied with water during the rainy season of each year from Vaughn creek and the other small streams which flow into the race.

During the time that Baxter remained the owner of the mill, he did not claim to have any right to the water in Vaughn creek, and the understanding between him and the respondent was, that the latter could take it, if he so desired, in a flume across the race and use it as he should think proper. And when Baxter did use it to propel the mill, it was by the license and permission of the respondent. In September, 1874, the interest of Baxter in the mill and its appurtenances, including the mill-race, was sold at sheriff's sale, and became the property of the appellant. For some time after he became the owner of the mill the appellant did not claim the water in Vaughn creek as a right under the deed giving the right of way to Baxter for the mill-race, but finally concluded that he had such right by virtue of the deed. In February, 1879, the respondent, by constructing a flume across the mill-race at Vaughn creek, diverted the water of that stream from the race into its ancient channel, for the purpose of obtaining water for his cattle. And soon afterwards this suit was brought to restrain him from diverting it, and for damages for the alleged wrongful act.

Yocom and Clarno, for appellant.

Stott & Gearin, for respondent.

Opinion of the Court—Kelly, C. J.

By the Court, KELLY, C. J.:

The deed made by the respondent to Baxter, on the sixteenth of August, 1872, is somewhat informal; but, after all, there is no difficulty in ascertaining what was the intention of the grantor when he made it, and what was actually granted by the deed. By a recital contained in it, it appears that Baxter was then in the act of constructing a race along Kilchis river, and the testimony shows that the place where the water was to be taken from the river was about one and a half miles above the upper end of respondent's land. Baxter was about to erect a saw-mill on a small piece of land which he had purchased on the lower end of the same that belonged to respondent, and the object in making the race was to convey water from Kilchis river to propel the mill, and necessarily to take it across the respondent's land.

By the deed the respondent granted to Baxter, his heirs, and assigns, the right of way over a strip of land, one rod in width, from the east side of his tract of land, to the saw-mill on the west side, to be used as a passage way for the purpose of floating logs to the mill and supplying it with water. The right so granted was an easement, an incorporeal right; a right which was intangible. It was not the grant of a strip of land, nor of any water naturally flowing on the land, but simply the right to dig a race and conduct water in that race across the land of respondent, for the purposes specified in the deed. When an easement is granted, nothing passes as an incident to such grant but what is necessary for its reasonable and proper enjoyment. And notwithstanding the grant, there remains in the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. And it is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. (3 Kent's Com. 420; *Maxwell v. McAtee*, 9 B. Munroe, 20; *Lyman v. Arnold*, 5 Mason, 195.)

Points decided.

It appears from the deed itself, as well as the evidence in the case, that it was manifestly the intention, both of the grantor, who made the deed, and the grantee, who accepted it, that the right of way was given to enable the latter to conduct the water from Kilchis river, not from Vaughn creek, to the saw-mill. And it would be a perversion of the terms of the grant to say that, because the grantee neglected to repair the dam in the Kilchis river, he thereby acquired the right to supply his mill with water from a stream which never was intended to be granted to him, and which, in fact, never was granted. Even if the respondents had granted fee simple title to the strip of land, instead of simply the right to take water over it, it is questionable whether Baxter, or his assigns, would be authorized to divert the water in Vaughn creek from its natural channel, to the injury of the riparian owners below the race-way. It is sufficient for us to say that no such right exists under the deed of the sixteenth of August, 1872.

The decree of the court below is affirmed with costs.

EDGAR POPPLETON, RESPONDENT, v. YAMHILL COUNTY, APPELLANT.

ASSESSMENTS—WRIT OF REVIEW TO CORRECT.—A writ of review may be prosecuted to review the orders made by the board of equalization of a county correcting the assessment of an individual taxpayer.

IDEM—BOARD OF EQUALIZATION—INCREASING ASSESSMENTS.—Said board of equalization has power to raise the assessment of a taxpayer, by adding to his assessment property owned by him, which was not found or included in his assessment by the assessor.

IDEM—FRAUDULENT LOANS TO AVOID TAXATION.—If a taxpayer, having a large amount of notes and mortgages, in order to escape the payment of taxes on the same, borrows a sum of money of a person residing out of the county, and deposits with his creditor such notes and mortgages, for the purpose of avoiding the payment of taxes on the same, such notes are taxable in the county where such taxpayer resides; and such deposit on transfer is a fraud on the revenue of the county. And it is competent for the board of equalization to try this question of fraud.

PRACTICE—WRIT OF REVIEW, QUESTIONS OF FACT NOT TRIED ON.—In trying questions raised in cases of review, this court will not try questions of fact which were passed on by the inferior court, unless such findings are manifestly wrong.

8	337
16	117
16	464
17 ⁷	621
19 ⁸	458

8	337
30	809
8	337
39	192
39	619

8	337
44	62

Opinion of the Court—Boise, J.

NOTES AND MORTGAGES TAXABLE.—Notes and mortgages are property which is subject to taxation.

APPEAL from Yamhill County.

The board of equalization of taxes for Yamhill county, at its September term, 1879, caused a notice to be served upon Edgar Poppleton, the respondent, in accordance with sections 38 and 39 of chapter 57, Miscellaneous Laws, requiring him to appear before said board, and show cause, if any he had, why certain notes and mortgages described in said notice, should not be assessed to him. On the day specified in said notice, Poppleton appeared before the board, and filed assignments of the notes and mortgages in question, which he had made in favor of De Lashmunt and Oatman, of Portland, and made oath as to the good faith of such assignments. The notes and mortgages aggregated twelve thousand two hundred and nine dollars and twenty-five cents. It was claimed in behalf of Poppleton that he had assigned this property to secure an indebtedness to De Lashmunt and Oatman for one thousand dollars. Upon the hearing, the board found that the assignment did not pass the assessable interest of Poppleton to De Lashmunt and Oatman, and it, therefore, increased his assessment by the sum of twelve thousand two hundred and nine dollars and twenty-five cents. The case was then taken before the circuit court on a writ of review, and the order and decision of the board of equalization was reversed, and it is from this decision of the circuit court that this appeal is taken.

E. C. Bradshaw, H. & A. M. Hurley, for appellant.

W. D. Fenton, James McCain, for respondent.

By the Court, BOISE, J.:

It is claimed by the appellants that this proceeding should have been dismissed in the circuit court, for the reason that no writ of review will lie from a decision of a board of equalization correcting the assessment of the property of a taxpayer. This question was before this court in the case of

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E. W. Rhea, appellant, v. Umatilla County, 2 Oregon, 298. In that case it was held that such board was a tribunal whose decisions are subject to be reviewed, and we think that decision correct.

It is claimed by the respondents that the board were not authorized by the statute, p. 756, sec. 38, to assess the notes in question, for the reason that their authority only extends to making corrections as to property already assessed by the assessor, and not to property which the assessor has failed to find. This question must be determined by the construction of section 38, which is as follows: "If it shall appear to such board of equalization that there are any lands or other property assessed twice, or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, *or any lands, lots, or other property not assessed*, said board should make the proper corrections." The property in question was property *not assessed*, and we think is embraced in this section in terms, and that it was a proper subject for consideration and adjustment by the board.

We come now to consider the only important question in the case, which is, Was the board warranted, from the evidence before them, in finding that the property was the property of Poppleton, and subject to assessment in Yamhill county? That the property in the notes was in Poppleton is not questioned, but it is claimed that by the evidence it appeared that they were pledged to De Lashmunt and Oatman to secure the one thousand dollar note given by Poppleton to them. If they were so pledged, in good faith, to secure the payment of this note, then they were not taxable in Yamhill county, but were taxable in Multnomah, under section 15, p. 757 of the statute. But if, in order to avoid the payment of taxes in Yamhill county, Poppleton borrowed one thousand dollars of De Lashmunt and Oatman, and assigned or delivered these notes to them for the purpose of avoiding such taxes, then the transaction was in bad faith and a fraud on the revenue of Yamhill county, and the question of the interest of the respondent in this transaction was a question of fact, which the board was

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necessarily called on to try from the evidence. We think the evidence sufficient to show the transfer of the notes into the possession of De Lashmutt and Oakman, and the finding of the board seems to indicate that such was their view of this fact. But they found that Poppleton was the owner of an assessable interest in these notes, and that the assignment did not pass the assessable interest in said notes. To have found this they must have found from the evidence that these notes were transferred by Poppleton to avoid the payment of taxes on them to said county, which would have been a fraud on the revenue of the county, and void as to the county, and could not affect the right of the county to have the property taxed. The board have not set out in their findings the facts found which enabled them to arrive at the conclusion that the transfer was to avoid the taxes, and the respondent claims that there was no evidence to support such a conclusion, and that the finding is not warranted.

We think there was some evidence to support such a conclusion: 1. The security was greatly disproportional to the amount of money borrowed, which may have been taken as a circumstance by the board. To illustrate, suppose a person who is involved, and on the eve of insolvency, sells property worth twenty thousand dollars to his son for one thousand dollars. In a suit by the creditors to set aside such a sale, it would be competent for a court to consider the inadequacy of the consideration, as evidence tending to show that the sale between the father and son was for the purpose of securing the property from payment of his debts.

2. The evidence shows that Poppleton continued to loan money in large sums, after the giving of this note of a thousand dollars, and shows that he was in circumstances to pay this note, which shows that it was not necessity which compelled him to deposit this large amount of notes as security for a thousand dollars. This tends to show that so large a deposit was not necessary to secure this loan.

3. The evidence shows that one of the large notes deposited by him as collateral, that is, the note of L. A. Smith

Opinion of the Court—Boise, J.

et al., for two thousand two hundred dollars, was taken by him from the bank and eight hundred dollars collected on it. This is evidence tending to show that he had control of these notes, and from these facts the board may have come to the conclusion that the transfer to De Lashmunt & Oatman was not in good faith, and to avoid the payment of taxes on this large amount of property. And as, in a case of this kind, it is the duty of this court to respect the findings of inferior tribunals, as to matters of fact passed on by them, when they have the opportunity of seeing the witnesses and better means of determining the surroundings of the parties than this court can have, we think, as a rule, it is better to not disturb such findings of fact on a writ of review, which is properly a proceeding to try questions of errors of law which appear on the record; and as it is apparent that this question, as to whether or not this transfer was made to avoid the payment of taxes, was considered and passed on by the board, we think that finding is binding on us in this proceeding.

It is further claimed by the respondent that notes and mortgages, being only evidences of indebtedness, are not property subject to taxation, and refer to article nine, section one, of the constitution of the state. This section provides: "The legislative assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal." Choses in action are a species of personal property, and in order to judge correctly whether or not the convention that framed our constitution intended to include notes as property to be taxed when they used the words "personal property," in the section just referred to, we may profitably examine the laws of the territory at the time the constitution was framed and promulgated. Section 3 of chapter 1 of the laws of the territory, then in force, defines personal property, subject to taxation, as "all household furniture, goods, chattels, moneys, and gold dust on hand or on deposit, etc.; and all debts due or to become due from solvent debtors, whether on account, contract, note, mort-

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gage, or otherwise," etc. Now this law was not only in force at the adoption of the constitution, but by the schedule, article eighteen of the constitution, it was declared to be the law in force under the constitution, and was in force and administered for years after the state government was inaugurated. We think, therefore, that the convention did intend that notes and mortgages should be regarded as personal property, and subject to assessment for taxes.

We think in this case the judgment of the circuit court should be reversed, and that the order of the board of equalization of Yamhill county be affirmed.

8	342
21	493
21	494
28*	636

BENJAMIN GRIFFIN, APPELLANT, v. JOHN J. A. PITMAN, RESPONDENT.

JUSTICE'S COURT—OMISSION TO SWEAR JURY.—If a justice of the peace, through inadvertence, omits to swear a jury in the trial of an action before him, and the parties, being present, proceed with the trial of the cause without making any objection to the jury until after judgment is entered on the verdict, it is then too late for the party against whom it is rendered to question its validity, on the ground that the jury was not sworn.

IDEML—NEW TRIAL, NO AUTHORITY TO GRANT.—After a justice of the peace has rendered a judgment, on the verdict of a jury in a case tried before him, he has no authority to set aside such judgment and grant a new trial.

APPEAL from Yamhill County.

This was an action brought by the respondent against the appellant in a justice's court to recover thirty-three dollars and forty-five cents. The case was tried with a jury, and the plaintiff had a verdict for the amount claimed, upon which a judgment was rendered. Subsequently it was discovered that the justice had inadvertently omitted to swear the jury. Thereupon, on motion of the respondent, the judgment and verdict were set aside and a new trial ordered. Upon the second trial the respondent failed to appear, and the appellant had judgment. The respondent then obtained a writ of review, upon which the second judgment was reversed and the first affirmed. From the order thus made this appeal is taken.

Opinion of the Court—Kelly, C. J.

E. C. Bradshaw, for appellant.

H. & A. M. Hurley, for respondent.

By the Court, KELLY, C. J.:

To the ruling of the court below the appellant assigns the following errors: 1. The court erred in rendering judgment on plaintiff's complaint, for the reason that said complaint does not state facts sufficient to constitute a cause of action. 2. The court erred in affirming the judgment of the justice rendered on the twenty-fourth day of January, 1878, for the reason that said judgment had been set aside on motion of plaintiff therein. 3. The court erred in sustaining the judgment of the justice rendered on the verdict of a jury that was not sworn.

In regard to the first assignment of error, we hold that the same was not well taken. The complaint alleges "that the plaintiff on the first day of June, 1877, contracted with the defendant to dig a well, in which he was to insure water, for which he agreed to pay the sum of thirty dollars. That the work was performed according to contract, and that the defendant is indebted to him in the sum of thirty dollars, and * * * that no part of the same has been paid, though due and demanded." Sec. 86, p. 123, of the code, provides that "in pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part." We hold that the allegation "that the work was performed according to contract," is equivalent to stating that the plaintiff duly performed all the conditions on his part.

2. In support of the second assignment, it is urged by the appellant that inasmuch as the judgment rendered by the justice on the twenty-fourth day of January was set aside on the motion of the plaintiff, it was error in the circuit court to hold that it was valid and binding. The justice had no power to set aside the judgment rendered by him on that day, and grant a new trial on the twenty-second

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of March. No such authority is conferred on justices of the peace by the statute, and none being conferred, it can not be lawfully exercised.

3. It is claimed by the appellant that the judgment rendered on the twenty-fourth of January was void because the jury was not sworn before they proceeded to try the case. The defendant was present at the trial, and ought to have urged this objection to the jury, before the rendition of their verdict. In practice, it is required of every one to take advantage of his rights at the proper time, and neglect to do so will be considered a waiver. If, through inadvertence, it happens on the trial of a cause that the justice fails to swear the jury, and either party, being present and aware of that fact, remains silent and takes the chances of a verdict in his favor, he will not be permitted to question the validity of it, if the verdict should prove unfavorable to him.

The court did not err in its rulings, and the judgment is affirmed.

HENRY SCHMIDT, APPELLANT, *v.* MAX VOGT, PHILIPENA CHAPMAN, AND J. B. CROSSEN, RESPONDENTS.

SCHOOL LAND—PURCHASER'S RIGHT TO SEVER TIMBER BEFORE COMPLETING PAYMENTS.—The purchaser of a tract of school land, having paid one third part of the purchase-money, and received a certificate of purchase under section 10, p. 632, of the Code, afterwards cut and piled up a quantity of cord-wood on the land, and then assigned his certificate of purchase; the assignee did not thereby become entitled to the wood by virtue of the assignment of the certificate. The wood so cut became personal property when severed from the realty, and belonged to the purchaser of the land who cut and piled it up; and it did not remain the property of the state until the land was fully paid for.

APPEAL from Wasco County.

This is an action of trover, brought by the appellant for the alleged conversion of one hundred and twenty-five and one half cords of woods, valued at six hundred and ninety dollars and twenty-five cents. On the eighth of June, 1877, B. F. Foley made application to the local agent of the board

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of school land commissioners to purchase eighty acres of school land in section 16, T. 2 S., R. 12 E., the price of which was one hundred dollars. He made the first payment on it, and gave two notes, amounting to sixty-six dollars and sixty-six cents, for the balance of the purchase money, and went into possession of the land. After the purchase, he cut the wood in controversy upon it, and piled it up. On the eighteenth of April, 1878, Vogt and Chapman commenced an action against Foley, and on the following day attached the wood, and held it until judgment was rendered in the action, on the seventeenth of June, 1878, against Foley. On the seventeenth of July, an execution was issued on the judgment, and placed in the hands of the sheriff, who had previously attached the wood. This writ was returned on the seventeenth of September, and on the same day, an alias execution was issued, which was filed with the clerk on the fifteenth of October, 1878, without any return of the sheriff's doings.

On the twenty-second of April, 1878, four days after the wood was attached, Foley transferred his right to the land on which it was cut and piled, to one Charles A. Schuster, who paid the balance of the purchase-money, sixty-six dollars and sixty-six cents and interest, on the twentieth of May, to the local agent of the board of school land commissioners, and on the twenty-seventh of May, 1878, obtained a deed for the land. On the thirteenth of August following, Schuster sold and conveyed the land and all his right and title to the wood in controversy to Henry Schmidt, the appellant, in consideration of one hundred dollars. The wood was then still upon the land. Thereafter, by agreement between Foley and Chapman and Vogt, the wood was delivered to the latter.

J. E. Atwater, for appellant.

W. Lair Hill, for respondents.

By the Court, KELLY, C. J.:

The position taken by the appellant is that Foley had no right to cut the wood in controversy on the land which he

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purchased from the board of school land commissioners until he had fully paid for it, and that, having done so, and severed it from the realty, it was and still remained the property of the state. That when Schuster bought the land from the state he acquired its right and title to the wood also, and that when Schuster sold and conveyed the land to appellant he became the owner of the wood as well as the land itself. We do not consider this position to be correct, but conceding for the present that it is, and that Foley was not the owner of the wood when cut and piled up, it does not follow that when the state conveyed the land to Schuster it transferred to him the wood that was upon the land.

In the case of *Wincher v. Shrewsbury*, 2 *Scam.* 3 Ill. 283, it appears that the plaintiff went upon a tract of land belonging to the United States and made a quantity of rails from timber trees on the land. The rails were lying in piles on the land when the defendant entered and purchased it from the United States. He then forbade the plaintiff from taking the rails off his land, and hauled them away and converted them to his own use without the consent of the plaintiff. In an action to recover the value of the rails, Chief Justice Wilson, delivering the opinion of the court, said: "At the time the trespass was committed by the plaintiff, the land, and consequently the timber growing on it, of which the rails were made, belonged to the government. The cutting of the timber was, therefore, an injury and a trespass against the government, and it had a legal remedy. Therefore the defendant had neither a right of property nor a right of action at the time of the plaintiff's trespass in making the rails. To what, then, did he acquire title by a subsequent purchase of the land? Certainly not to a right of action for a previous trespass; nor to the timber which had previously been severed from the land and converted into rails, farming utensils, or anything else. A certificate of purchase or patent vests in the patentee a title to the land, and, generally, all that is growing on or is, in contemplation of law, attached to the land, as houses, fences, growing timber, etc., and, it is said, fallen timber,

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passes with the land. But that which has been severed from the land, and by the art and labor of man converted into personal property, such as implements of husbandry, barrels, furniture, or even rails, when not put into a fence, * * * * do not pass with it, any more than the grain, grass, or fruit which has grown upon it and been gathered from it. The government being the owner of the land at the time of the trespass by cutting timber, it might recover in trespass for the injury done to the land, or by action of trover to recover the value of the rails, which would certainly be a bar to the defendant's recovery for the same trespass, * * * * The vendor and vendee of the land can not both have a remedy for the same trespass." The same principle was afterwards enunciated by that court in a similar case. (*Brown v. Throckmorton*, 11 Ill. 529.)

Applying to the case under consideration the principle declared by the supreme court of Illinois, which we hold to be a correct exposition of the law, it follows as a necessary result that no title to the wood passed to Schuster when the state made him a deed for the land; and consequently he could give none to the appellants; and it is well settled that in an action of trover the plaintiff must establish property in himself at the time of conversion, in order to recover. (*Sheldon v. Soper*, 14 Johns. 353.) We hold, however, as a matter of law, that the wood for the conversion of which this action was brought, did not belong to the state, but that Foley was the owner of it after it became personal property by severance from the realty. He had purchased the land, paid one third of the purchase money, and given his notes for the balance; and was in the lawful possession of it. He could not, therefore, on any principle of law, be considered a trespasser when he cut the wood upon it, nor be held responsible for the value of it. The legislative assembly, when it authorized a sale of the school lands belonging to the state, imposed no condition upon the purchaser as to the manner in which he should use the land. Whether it is good policy or not to permit him to cut down and dispose of growing timber, before he has fully paid the purchase money, is a matter for legislative consideration,

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with which the courts have nothing to do. It is for them to say that any restrictions should be imposed upon him in the enjoyment of the land, or the use he shall make of it.

It is true that a pre-emption settler on the public lands, before purchasing the same, is not allowed to cut down and dispose of growing timber, other than such as may be necessary for his own use in the ordinary course of husbandry. But that is because the land belongs to the United States, and the settler has, at most, but a license from the government to occupy it, and the right to purchase the same within a specified time, at the minimum price. He is not, therefore, permitted to lessen the value of the land which is not his own.

It follows, from the view we take of the law, that the appellant never had any interest or property in the wood in controversy, and that he is not entitled to recover in this action. It is not necessary, therefore, to examine or consider the other points raised in the argument by counsel.

The judgment of the circuit court is affirmed with costs.

8 348
34 412
d34 414
d34 416

JOHN J. GERRISH ET AL., APPELLANTS, *v.* A. HINMAN ET AL., RESPONDENTS.

DEVISE—SPEAKS FROM TIME OF TESTATOR'S DEATH.—The general rule is, that a devise, in designating the objects of the testator's bounty, speaks from the time of his death, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts as may be entitled to consideration in construing its provisions.

WILL—CONSTRUCTION.—The will of G. provided as follows: "I devise all that may remain of my real and personal property, to each of my living children, and the children of my deceased daughters, alike." *Held*, That the latter being mentioned in their representative capacity, thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him, the property should be divided *per stirpes* and not *per capita*.

APPEAL from Yamhill County.

This is a suit for partition of real property among the children and grandchildren of James Gerrish, under his will. The clause in the will, under which the parties all

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claim, is as follows, to wit: "I give and bequeath to my beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time. At her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise."

When this will was signed the testator had three children—two sons and a daughter, living—and two daughters dead, who had left children. At the time of the death of the testator he had two sons living, and the children of three daughters, deceased; and such were the objects of his bounty at the time of the decease of Mary Ann, the tenant for life.

James McCain, W. D. Fenton, and Northup & Gilbert, for appellants.

Shattuck & Killin, and T. H. Tongue, for respondent.

By the Court, PRIM, J.:

The parties to this suit all claim under the will of James Gerrish, and the clause under which they claim is as follows: "I give and bequeath to my beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time. At her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise."

Upon the construction of this clause, two questions are presented for consideration: 1. At what time does the will speak as to the objects of the testator's bounty, at the time of his death or at the date of the will? 2. How do the objects of his bounty take, *per capita* or *per stirpes*?

On the first proposition, it is claimed by the appellants that the will, in designating the objects of the testator's bounty, speaks from the time of his death and was from the date of the will. This proposition is correct, and is well established by the authorities. The general rule appears

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to be that "a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intent can be inferred from some particular language of the will or from such extrinsic facts as may be entitled to consideration in construing its provisions." (*Campbell v. Rawdon*, 18 N. Y. 412; 1 Redfield on Wills, pp. 7, 8, 9, 210; *Jarman on Wills*, pp. 286, 287; *Walker v. Williamson*, 25 Ga. 540; 21 Conn. 550.) And in this case there is no language in the will nor extrinsic facts from which a contrary intent can be inferred. Then we hold that at the time of the death of the testator, all of his children and the children of his deceased daughters took a vested interest in his estate, subject to the life estate of his said wife, Mary Ann. (*Henry Warren v. Mary M. Hembree, ante*, 118.)

The next question to be considered is whether the objects of the testator's bounty are to take *per capita* or *per stirpes*. In this matter the intention of the testator must control, and that must be ascertained by looking into the language employed by the testator in designating the objects of his bounty. The objects of his bounty are designated as his living children and the "children of deceased daughters." The number and names of the latter are not mention in the will, but are merely referred to as a class in their representative capacity, thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him. Such is the construction given generally by the courts upon will containing similar provisions. (*Lyon v. Acker*, 33 Conn. 222; *Risk's Appeal*, 52 Pa. St. 269; *Fissel's Appeal*, 27 Id. 55; 3 Jones N. C. Eq. 205.)

Entertaining the views herein expressed, we have reached the conclusion that it was the intention of the testator that his property should be divided among his descendants named *per stirpes* and not *per capita*.

Therefore it is ordered that the decree of the court below be so modified as to divide the land into five equal portions.

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ROSA N. GERRISH ET AL., RESPONDENTS, v. JOHN J. GERRISH ET AL., APPELLANTS.

8	251
21	306
28 ^a	9

CONSTRUCTION—WILL—ADOPTION OF PROVISIONS BY REFERENCE TO ANOTHER WILL.—Where the will of a testatrix otherwise properly executed refers to the will of her late husband, and so describes it as to leave no doubts of its identity, and adopts the provisions therein contained; *Held*, that it becomes a part of such will, and should be considered in construing its provisions.

IDEM.—It appears that the provisions of the will of G. are referred to, adopted, and made a part of the will of the testatrix. *Held*, that the children and grandchildren of the testatrix having been named in the will of G., are "named and provided for" in the will of the testatrix within the meaning of the statute.

IDEM—AUTHORITY FOR INTERPRETING—STATUTES OF OTHER STATES.—When the statute of another state is adopted in this state, we must look principally to the decisions of that state to ascertain its proper judicial construction.

WILLS—NAMING CHILDREN IN—OBJECT OF STATUTE.—The object of the statute is not to compel parents to make actual beneficial provisions for their children and their descendants, but to prevent the consequences of forgetfulness or oversight, and to produce an intestacy only when the child, or the descendant of such child, is unknown or forgotten, and thus unintentionally omitted.

APPEAL from Yamhill County.

This suit is a suit to quiet title. The respondents claim as devisees of Mary Ann Gerrish, and the appellants claim as her heirs at law. The appellants claim, that as to them the will of Mary Ann is void, because they, being the children and grandchildren, representing deceased children, are neither named nor provided for in the will of Mary Ann. Mary Ann made no mention of or provision for the appellants, except that her will contained the following provision: "I direct that whatever may remain at my death of the personal property bequeathed to me by my late husband, James Gerrish, for my life, shall at my death be distributed in accordance with the provisions made in the last will of my said husband concerning the same." The will of James Gerrish, referred to, provided as follows: "I give and bequeath to my beloved wife Mary Ann all the rest and residue of my personal property for her life-time; at

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her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters alike, to be divided as a majority of them shall say, by sale or otherwise."

The controversy is concerning the construction of Mary Ann's will. If it be held that the heirs generally are named or provided for, then the appellants take nothing; otherwise, Mary Ann as to them died intestate and they have a valid and subsisting estate and interest in the lands in controversy.

Shattuck & Killin, Thos. Tongue, R. Williams, and Fenton & McCain, for appellants.

Northup & Gilbert, for respondents.

By the Court, PRIM, J.:

This is a suit in equity to quiet title to a certain parcel of land lately owned by Mary Ann Gerrish, deceased. The respondents claim as the devisees of said Mary Ann, and the appellants claim as her heirs at law. The appellants are the children and grandchildren of the deceased, and they claim that said will is void because they are neither named nor provided for therein; and that is the question to be decided on this appeal. The statute, page 788, section 10, provides that "if any person make his last will and die, leaving a child or children, in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as shall regard such child or children, or their descendants, not named or provided for, shall be deemed to die intestate." * * * * It is admitted that the will itself makes no direct reference to the other children of the testatrix, but it is claimed that it refers to her husband's will, and adopts the provisions made in that for all of her children and descendants.

The clause in the will which refers to her husband's will is as follows: "I direct that whatever may remain at my death of the personal property bequeathed to me by my

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late husband, James Gerrish, for my life, shall at my death be distributed in accordance with the provisions made in the last will of my said husband concerning the same." This is the only clause in the will which refers in any manner to the appellants. The portion of the husband's will, to which the above clause in the will of the testatrix refers, is as follows: "I give and bequeath to my beloved wife, Mary Ann, all the rest and residue of my real and personal property for her life-time; at her decease I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughter alike, to be divided as a majority of them shall say, by sale or otherwise." This portion of the will of James Gerrish is clearly referred to in the will of the testatrix, and the provisions thereof adopted as a portion of her will. In *Tounel v. Hall* (4 Com. 140), it was held that "where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper, it seems, makes part of the will, although the paper be not subscribed or even attached."

In this case there can be no question as to the identity of the instrument referred to. The husband of the testatrix had been dead and his will admitted to probate several years before her will was written. In fact, she was then enjoying under the provisions of his will a life estate in several farms and a large amount of personal property. Then, considering the language of the will of James Gerrish, thus adopted and made a part of the will of the testatrix, we think there was a sufficient naming of the appellants to bring the case within the provisions of the statute.

Our statute is an exact copy of the Missouri statute, and the courts of that state having been called upon frequently to construe it, we must look principally to the decisions of that state to ascertain its proper judicial construction. In that state it is held that the statute does not require that an actual provision shall be made for the children, nor that the children shall be designated by name; that its object is not to compel parents to make testamentary provision for chil-

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dren, but to prevent the consequences of forgetfulness or oversight. In *Hockersmith v. Slusher* (26 Mo. 237), Judge Richardson says: "It may now be considered as settled that the object of this provision is to produce an intestacy only when the child or the descendants of such child is unknown or forgotton, and thus unintentionally omitted, and the presumption that the omission is unintentional, may be rebutted when the tenor of the will, or any part of it, indicates that the child or grandchild was not forgotton." In that case a bequest had been made to a son-in-law, without naming his relation, and on the application of the daughter for a child's share, it was held that the bequest must have been given to her husband because he was such, and the daughter, though not named or provided for, could not have been forgotton. In *Guitar v. Gordon* (17 Mo. 408), the testator named his daughter, who was then dead, but did not name her children, and that was held a sufficient provision for his grandchildren, as they were represented by their mother, who was in his mind, though dead. To the same effect is *Block et al. v. Block et al.*, 3 Ohio, 495; *Beck v. Metz*, 25 Mo. 70; *McCourtney et al. v. Mathes*, 47 Id. 533.

The decree of the court below is affirmed.

SAMUEL D. GAUNT, APPELLANT, *v.* J. B. PERKINS,
RESPONDENT.

JUSTICE'S COURT—DEFAULT, AT WHAT HOUR TAKEN.—Where the docket of a justice of the peace shows that he rendered judgment against a defendant for want of an answer, without giving him an hour after the time specified in the summons, in which to make his appearance, such judgment will be reversed on a writ of review.

APPEAL from Yamhill County.

The respondent brought an action in a justice's court against the appellant, to recover a balance due him on an account. A summons was issued and served on the appellant, requiring him to appear "on the twenty-sixth day of March, 1879, at one o'clock in the afternoon of said day," etc. On that day the following proceedings were had be-

Opinion of the Court—Kelly, C. J.

fore the justice, as appears by his docket: "March 26, A. D. 1879, one o'clock P. M. Cause called. The plaintiff appeared in person, and answered the call. The defendant after being called three times, came not, but wholly makes default. The plaintiff, therefore, demands judgment for the sum of one hundred and six dollars and thirty-seven cents. It is therefore ordered and adjudged by the court, in default of the appearance of defendant, that the plaintiff do have and recover judgment of the defendant for the full sum of one hundred and six dollars and thirty-seven cents," etc.

The appellant obtained a writ of review, and assigned the following among other errors: "That the justice did not give the defendant one hour in which to appear, as allowed by statute." After hearing the case, the circuit court dismissed the writ and affirmed the judgment of the justice, whereupon this appeal is taken.

W. D. Fenton and James McCain, for appellant.

E. C. Bradshaw, for respondent.

By the Court, KELLY, C. J.:

The statute regulating the manner of proceeding in justice's court (sec. 124, p. 479), is as follows: "A party is entitled to one hour, in which to make his appearance, after the time specified in the summons, and not otherwise."

* * * It appears from the justice's docket that at one o'clock, the hour that the defendant was summoned to appear, he made default, and judgment was then rendered in favor of the plaintiff for the amount demanded. The justice should have waited one hour, as required by the statute, before he entered the judgment. Counsel for respondent claim that there is a legal presumption that the justice properly discharged his duty in this respect. Such is not the case where the contrary affirmatively appears.

The judgment of the circuit court, as well as the judgment of the justice's court, is reversed.

Statement of Facts.

8 556
10 211THE CITY OF PORTLAND, RESPONDENT, *v.* PERRY G. BAKER, APPELLANT.

PLEADING—INJUNCTION—IRREPARABLE INJURY.—To warrant the court in granting an injunction, it must appear from the facts stated in the complaint that the plaintiff will suffer irreparable injury unless the defendant be enjoined; and the allegation in the complaint that the plaintiff will be irreparably injured is not sufficient. Facts must be stated from which the court may judge of the injury and its extent.

EMPLOYMENT OF CHINESE—REMEDY FOR VIOLATION OF CONTRACT CONCERNING.—Where the statute declares that the employment of certain laborers on the public works shall render null and void a contract by a contractor with a municipal corporation, such contract is forfeited by the contractor on the doing the unlawful act, and the corporation may disregard the contract without resorting to a court of equity to annul the contract.

APPEAL from Multnomah County.

On the twenty-ninth day of May, 1879, in pursuance of ordinance No. 2427, duly passed by the common council, the appellant entered into a contract with city of Portland, for the improvement of Tenth street in front of and abutting upon block Nos. 266 and 267 in said city. The improvement consists of grading, laying sidewalks and crosswalks. The consideration, as named in said contract, is merely nominal.

It is alleged, that previous to the entering into the contract, the appellant, for the purpose of avoiding the provisions of the law upon the subject of the employment of Chinese upon the public streets, had entered into a private contract with the owners of the adjacent property, which would, under the law, be chargeable for the improvement made under said contract, and that the real consideration for said work was to be paid to said appellant by such owners without the intervention of the city. That said improvement is a public work to be done under the supervision of the respondent, The City of Portland, and to the satisfaction of its officers and agents. That by the provisions of the said contract, the appellant expressly agreed and promised not to employ any Chinese upon said work, and said contract was upon that condition. That afterward he entered upon the performance of the said contract, and is

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now engaged in the same. That in violation of the law and of the express terms of said contract, he is performing, and causing to be performed, the labor of said improvement, almost wholly by Chinese labor.

That by reason of the premises, the respondent and the citizens thereof have been and are greatly damaged, and, unless restrained, will suffer great and irreparable injury, and that the city has no remedy at law, wherefore it asks that the appellant be restrained from employing Chinese on said work.

The appellant demurred. The demurrer was overruled and judgment entered as prayed for.

Northup & Gilbert, for appellant:

To entitle a suitor to an injunction, he must suffer irreparable injury if the injunction is not granted. This principle is a fundamental one in equity, and we only quote from many authorities. (High on Injunctions, secs. 388, 421, 428, 486, 519; 11 Am. Dec. 506.) The mere allegation in the pleadings that plaintiff will suffer irreparable injury if injunction not granted, is not sufficient. Facts must be alleged from which it must appear that such injury will arise. (High on Injunctions, sec. 35; *Branch v. Supervisors*, 13 Cal. 190; *Battle v. Stephens*, 32 Ga. 25.) Equity will not interfere where no irreparable injury is alleged beyond an averment of a breach of contract. (*W. Union Tel. Co. v. Phila. R. R. Co.* 9 Phil. 494.) Equity will not interfere where the injury is susceptible of pecuniary compensation. (*Burges v. Kattleman*, 41 Mo. 480; *Morris & Co. v. Cen. R. R. Co.* 16 N. J. Eq. 419; *Pusey v. Wright*, 31 Penn. 396; *Hart v. Marshall*, 4 Minn. 294; *Cockey v. Carroll*, 4 Md. Ch. 344.) Nor will an injunction be granted for any purpose which can be attained by any other process. (*Ward v. Kelsay*, 14 Abb. Pr. 107; *Marks v. Wilson*, 11 Id. 88.) If a statutory remedy exists for a redress of the wrong complained of, equity will not interfere by injunction. (High on Injunctions, secs. 31, 82, and 697.) Nor will equity restrain a party from the violation of a contract where the parties have fixed the damages for a violation. (*Nesle v. Reese*, 19

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Abb. Pr. 240; *McCafferty v. McCabe*, 4 Id. 57.) Nor while the right to an injunction is doubtful. Courts of equity, in granting injunctions, act with great caution. (High on Injunctions, secs. 523, 762; *Steamboat Co. v. Livingston*, 3 Cow. 755; *Attorney General v. Utica Ins. Co.* 2 Johns. Ch. 390.)

Apply the principles above stated to the case at bar. It is alleged that the plaintiff will suffer irreparable injury if an injunction is not granted. How, is not stated; nor are facts stated from which an injury can arise. The city has done its duty when it provides properly improved streets, and sees that the claim of the contractor therefor is paid from the proper fund. It can make no difference to the city what class of labor is employed in the work. If the contractor employs Chinese, they get the money that otherwise would be paid to other classes of labor. But if Chinese are not employed, it does not follow that citizens of Portland or of Oregon *will* or *must* be. The latest importation from the remotest corners of the earth, provided he be not a Chinaman, may be employed. The only qualifications are muscle and the will to use it. It is claimed, however, that an open violation of the law brings lawful authority into disrespect. This may be so, but it is not the province of equity to interfere. The only ground for this would be, that the employment complained of constitutes a nuisance, but that can not be claimed in this case. Even if the citizens of Portland are injured by the acts alleged, it is not the province of the city itself to correct them. It can not maintain a suit to protect them in their rights of labor. It has no such trust or Quixotic mission, nor is it its duty to bring suits to enforce state laws. Its duty and authority alike are confined to its own ordinances; it derives its power entirely from its charter. (Charter city of Portland; Dillon on Municipal Corp., secs. 9a, 9b, and 10.)

But a remedy exists at law. The statute itself provides one. If Chinese labor is employed, the contract becomes void; if void, then the contractor can get no pay; a void contract can not be enforced. It was the intention to make

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the remedy simple by stopping payment. But it is urged that as the consideration in this case is a nominal one, the contractor and the owners of the adjacent property having, prior to the letting of the contract by the city to defendant, made a contract for the improvement in which the real consideration was to be paid, the penalty is small and the contractor gets his pay, and thus the law is evaded. Not so. The contract with the property owners is void equally with that of the city. If the property owners choose to pay when they can not be compelled to, is it the right of any one to prevent them? Besides, the city does not allege its ignorance of this prior contract at the time of entering into the contract with defendant. It is only where one has exercised due caution to prevent an injury, that he can be relieved by injunction. (High on Injunction, sec. 707; *Russ v. Wilson*, 22 Me. 207.)

The law under which relief is sought (Laws of 1878, p. 9) is void. It is in conflict with the constitution and treaties of the United States. All treaties are the supreme law of the lands. (Constitution of U. S. art. 6.) The treaty with China of June 18, 1858, and the additional articles thereto of July 28, 1868, provide: "That the two high contracting parties recognize the inherent and inalienable right of man to change his home and allegiance; and, also, the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other for the purpose of curiosity, of trade, or as permanent residents." Article VI. declares: "That Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may be then enjoyed by the citizens or subjects of the most favored nations." (Pub. Treat. U. S. 148.) Chinese laborers stand on the same footing with those of Great Britain. No distinction can be made. (*Baker v. City of Portland*, a decision of the U. S. circuit court for Oregon; see, also, the decision of Justice Field in the celebrated "Queue Ordinance Case," lately rendered; Reporter, August 13, 1879.)

Argument for Respondent.

J. C. Moreland, City Attorney, and A. H. Tanner, for respondent:

Two questions are presented: 1. Is the law of this state, prohibiting the employment Chinese laborers upon streets and public works, valid? 2. Can this law be enforced by injunction?

The first question is one of interest, and the answer thereto involves questions of great magnitude. To defeat this law, appellant relies upon the treaty of the United States with the Chinese empire. In the discussion of this question, we admit fully the authority of the United States to make treaties with foreign nations. But whenever the treaty infringes upon the rights of the states to manage their domestic affairs in their own way, then the treaty becomes null and void. Suppose this treaty had undertaken to grant Chinese in the several states immunity from punishment for crime committed in those states, whom could it bind? Certainly, no one. And no treaty can be binding which in any wise infringes upon the right of the states to legislate upon all matters upon which the power to legislate was not delegated to the general government by the constitution. The treaty-making power can not rise above legislative authority. When the power is not expressly delegated, or does not arise by necessary implication, it remains in the states. The treaty provides that "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may be then enjoyed by the citizens or subjects of the most favored nations." These qualifying words, "in respect to travel or residence," certainly mean something. If they imply the right of the Chinese to come here and enjoy all the rights guaranteed to other nations, in all particulars, then why qualify their rights? These words "travel" and "residence," are well defined. There is no necessity of resorting to courts to interpret them. Their meaning is known of all men. Apply to this language the two familiar maxims, both of which are well-sustained axioms of constructions, viz., "The expression of one thing is the exclusion of another," and "That which is expressed,

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puts an end to that which is implied," and the discussion would seem to be at an end.

There is another rule of construction, which should be applied to this case: When the court is at liberty to adopt one of two constructions upon a law, that will be adopted which favors the rights of our citizens, rather than that which is against their rights. Again, it is a fundamental rule of construction that the court will, if possible, give such a construction as will give the statute the effect intended by the legislature, and every reasonable doubt will be solved in favor of the legality of the legislative action. (Cooley Const. Lim. 181.)

There is an authority directly against the legality of this law, in the decision by his honor Judge Deady, in the United States circuit court, last summer. In that case, the learned judge holds that the right to reside in a foreign country implies the right to labor there for a living, and that any attempted intrenchment upon that right is beyond the power of the state as regards Chinese.

His Honor Judge Bellinger, in passing upon this case in the court below, reviews somewhat this decision, and his reasoning upon the case is so apt that we give it:

"The case of *Baker v. The City of Portland* is in point, but I can not admit the correctness of its conclusion. The fact that the improvement in question is a public improvement has not been questioned. The state has the power and it is its duty to provide means of facilitating communication between distant localities. The establishment and maintenance of roads is therefore one of the high exercises of its sovereign power. A street in any city or town, common to all people, is a public highway. The act of a state legislature authorizing the paving and grading of streets in a city, and the assessment of the expenses of the same upon the owners of lots fronting on such street, has been held to be a proper and constitutional exercise of the taxing power by the legislature. (Angell on Highways, sec. 181.) The city, in opening or improving streets, exercises a merely delegated authority conferred by the state. The right to improve streets, and the manner in which the improvement

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shall be made, are matters exclusively within the regulation and control of the legislature—as much so as the erection of public buildings for state uses. Those who perform labor upon such improvements are in an employment which the state has authorized and provided for, and which is paid for out of a fund raised, as has been seen, by a tax. It follows that if the state can not prohibit the employment of any class of persons upon street improvements, it can not make such prohibition in respect to any employment which it authorizes. If the legislature should enact that no Chinese subject should be employed as guards at the penitentiary, or as janitors about various offices of the state, or as workmen upon the unfinished capitol building, the act, under the authority cited, would not be allowed to stand.

“The decision in the case referred to is upon the assumption that the right secured by the treaty to subjects of China to reside in the United States implies the right to labor here for a living. Conceding this, it does not follow that the right to labor imposes upon the state the duty of providing employment. If this right to labor is thus secured, it is nothing more than the right to labor for those who choose to employ them. Is its right in this respect less than that of citizens within its jurisdiction? The state has undertaken to say for itself that it will not employ this class. This is not the limitation of a right, but the exercise of one. The construction of public works is sometimes resorted to by governments as a matter of state policy, one of the objects of the improvement being to benefit the laboring classes by providing an opportunity for labor. The propriety of the adoption of this policy in this country is sometimes urged. It would certainly not be claimed that the advantages which such a policy offers to labor is necessarily the property of the world, and that the government has not the right in the bestowal of its favors to discriminate between its own citizens and aliens.

“It is not apparent upon what reason the objection to the exclusion of Chinese subjects from employment on public works can be made that will not apply to every branch of the public service, nor, if a law which so excludes them is

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void, why a law which prescribes such qualifications for office-holders as in effect excludes them from office should not also be held to be void. It is clear that if the right of residence is impaired by the determination of the state not to employ them, the resolution of a manufacturing corporation not to employ them will have the same effect. In either case, as the argument goes, the opportunity to earn a living, which the right of residence is made to imply, is abridged.

* * * A court will hesitate in construing a law to imply an intention on the part of the law-maker to do that which is unreasonable. There are no presumptions that the treaty-making power acted without inducement; that it granted away important privileges without any compensating advantages. Unreasonable concession must be clearly expressed. And it is not probable in this case that it was intended by the treaty power to concede all the rights which it is the object of government to secure to its citizens for the consideration which is implied in the extravagant construction given the treaty. * * * Nor is it probable that the treaty intended to destroy the police power of the states—the right of self-preservation of which man can not be divested under any form of government or in any state of society. There are no presumptions in favor of a construction that makes the treaty so unreasonable and far-reaching in its results, and that abolishes in favor of Chinese subjects that honorable distinction which is the citizen's just pride, and which it is obviously the policy of the government to maintain.

"In the case of *Ho Ah Kow v. Sheriff Nunan*, it is decided that the ordinance which provides for cutting the hair of criminals is special legislation, for the reason that upon Chinese subjects it operates as a cruel and unusual punishment; that though general in its terms, it operates upon a specific class with exceptional severity, since the possession of long hair is a religious and national custom peculiar to that class. The decision is one of unusual interest. It lays down the doctrine that when any general law bears with greater severity upon one class than upon others, although the fact may be due to the customs, peculiar

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views, or religious beliefs of that class, such law is special legislation and void. Stated as broadly as the decision states it, the polygamous practices of the Mormon sect will find ample guarantees in the fourteenth amendment, and a sect religiously believing in human sacrifice might hope to set aside any state statute against homicide.

"But the argument against the infliction of cruel and unusual punishment has no application in the cases under consideration, and the decision upon the ordinance case can have no more than a remote bearing in their decision. Courts are never in haste to declare acts of the law-making power void, and for that reason, in cases like these, if the words of the treaty are susceptible of two meanings, one favorable to the law of the state and the other hostile to it, the former will be allowed to prevail. So far as this court is concerned, the law of the state against the employment of Chinese subjects upon public works will be enforced."

The second question suggested, we think, is one of less difficulty. If the law be valid, then the only possible way it can be enforced is by injunction. The charter takes away the right to govern streets and highways from the state, where it was primarily vested, and places it in the city. It can designate the kind of improvement, and the time and manner of putting it down. It pays the contractor by drawing warrants upon the fund for the improvement of the street, and that fund is only supplied by the levy of an assessment upon the owner whose property is improved. Now, if that owner shall, as alleged in this case, make a private contract to improve the street, then it is taken at a nominal rate from the city. No money is required to be collected; the contractor presents no bill to the city; the work has been done by Chinese labor; the law of the state and the express terms of his contract have been violated, and yet there is no remedy unless by injunction. When a contract contains covenants to do certain acts, and also other covenants to abstain from doing certain other acts, the breach of the negative covenants may be restrained by injunction, even though there may be no jurisdiction to compel a specific performance of the affirmative covenants. (3 Waits' Ac-

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tions and Defenses, sec. 6, p. 693; 26 N. J. Eq. 40; 1 Holmes, 253; Hilliard on Inj. 621; High on Inj. secs. 17, 23, 24, 31, 695, 697, 714, 733, 734, 735, 913; 23 N. J. Eq. 161; 34 Ind. 115; 44 Ind. 248; 5 Wall. 74; 39 Wis. 160.)

In the present case the defendant was not only bound by the provisions of the state law not to employ Chinese, but he was bound by the solemnity of his contract. The city could not compel him to go on and employ other laborers, but in the language of the celebrated Lord Eldon, "it could do the only thing in its power; it could induce him indirectly to do one thing by restraining him from doing another."

The enforcement of specific covenants are matters which are properly cognizable in courts of equity, and the remedy by injunction to prevent the violation of negative agreements not to do a particular thing, is closely akin to the remedy by specific performance of agreements of an affirmative nature. (High. on Inj. sec. 913.)

By the Court, BOISE, J.:

We think the complaint in this case does not show that the plaintiff has or is likely to suffer any pecuniary injury from the employment of Chinamen by the defendant, and that the complaint does not therefore make a case which would authorize the court to interfere by injunction. It is true the complaint alleges "that by reason of the premises (that is, the employment of Chinamen), the plaintiff and the citizens thereof have been and are greatly damaged, and that unless defendant is restrained, will suffer great and irreparable injury." But the complaint fails to allege in what manner the city is injured, either by showing that the work is not well done, or making any allegation of any fact from which the court can conclude that any injury has or will result from such employment, and facts showing the injury must be alleged to warrant the court in restraining a defendant by injunction, which is the exercise by the court of an extraordinary and harsh power, which can not and ought not to be invoked or exercised except in cases where a plaintiff is in danger of suffering irreparable injury. In

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High on Injunction, sec. 35, the rule is stated to be that “the mere allegation of irreparable injury will not suffice to warrant an injunction; but the facts must appear on which the allegation is predicated, in order that the court may be satisfied as to the nature of the injury.”

The contract in this case, between the city and the defendant, was simply an undertaking on the part of the defendant to do the work on Tenth street for a nominal consideration, with the understanding that he should be paid for said work by the owners of the adjacent property, and that he should not employ Chinamen to do the work. The city had no pecuniary interest in the matter of who did the work, except to have the work well done. On this subject there is nothing alleged in the complaint, and we are not to presume, from the employment of Chinamen, that pecuniary injury would result.

If the act of the legislature referred to is in force, then the contracts which the defendant had, both with the city and with the adjacent owners, became void when he violated the law by employing Chinamen, for it provides that “all contracts which any person or corporation may have for the improvement of any such street or part of street, or public works or improvements of any character, shall be null and void, from and after the date of any employment of any Chinese laborers thereon by the contractor.” When the fact of the employment became known, the contract was forfeited to the city, together with the work done by the Chinese. From the time of such violation, the contractor had no more right to work on the street than any other person, and the city being a municipal corporation, with full power to protect its streets, had no need of aid from a court of equity.

We think, therefore, that the plaintiffs have not shown in the complaint a sufficient case to warrant a court of equity in granting an injunction, for no injury is shown to have resulted or to be likely to result from the acts of the defendant. He has violated the law, his contract has become null and void, and the law executes that penalty by depriving the defendant of all benefits under the contract.

Argument for Appellant.

The view we take of this case renders it unnecessary to decide the question, whether or not this act of the legislature is in conflict with the treaty with China, and we do not express any opinion on that subject.

The decree of the circuit court will be reversed, and the plaintiff's complaint dismissed with costs, but without prejudice to the rights of plaintiff to commence a new suit.

**DANIEL SPRAGUE, APPELLANT, v. F. A. FLETCHER
ET AL., RESPONDENTS.**

WAIVER—DEMAND OF PAYMENT—PROMISSORY NOTE.—F., who was an accommodation indorser, indorsed on the back of a note before due, these words: "I hereby waive notice of protest for non-payment." *Held*, not to be a waiver of *demand of payment* from the maker when due. Agreements of this character are to be construed strictly, and not extended beyond the fair import of the terms.

APPEAL from Multnomah County. The facts are stated in the opinion.

Caples & Mulkey, for appellant:

The complaint alleges that the indorser waived demand and protest for non-payment by the following indorsement on the back of the note: "I hereby waive notice of protest for non-payment." The indorsement on the note is an "express waiver," and an admission that the note has been presented or need not be presented. (3 Denio, 16, same case as below; 1 N. Y. 186; *Matthey v. Galley*, 4 Cal. 63; 5 East, 230; Chitty on Notes, 747; 19 Ind. 110; Edwards on Bills, 594; Story on Promissory Notes, 347; *Wall v. Bry*, 1 Louis, 312; *Scott v. Green*, 10 Barr. P. 103; Biles on Bills, Sharswood's ed., top 350, note; Story on Notes, 479, sec. 354.)

The question here presented is as to the sufficiency of the pleading. The allegation here is much stronger than in the California case above cited; there the allegation was simply that Galley & David "waived notice of non-payment," which the court held to be sufficient. In this case the complaint alleges that Fletcher "waived demand and

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notice of protest for non-payment;" also setting forth the waiver in terms as indorsed on the back of the note. The word protest, in a popular sense, and as used among business men, includes all the steps necessary to charge an indorser, and where he waives notice of protest he waives everything. (*Coddington v. Davis et al.*, 1 N. Y. 186.)

E. C. Bradshaw and Wm. Strong & Sons, for respondents: The language of the indorsement is clear and distinct: "I hereby waive notice of protest for non-payment." This does not waive the necessity of a demand. It is questionable whether it waives a notice of non-payment. Demand and notice of non-payment are two distinct things, both of which are necessary to charge an indorser. (Story on Promissory Notes, secs. 272, 366; 11 Wend. 629; 6 Mass. 524; 4 Am. Dec. 175; Edwards on Bills, 596.)

By the Court, PRIM, J.:

This action was brought against Fletcher as an accommodation indorser on a promissory note. The complaint alleges that on the second day of August, 1875, one Jane Armstrong made and delivered to one T. Coyle her promissory note for four hundred and eleven dollars and eighty-seven cents, payable with interest on one per cent. a month in ninety days after date. That before the delivery of the note to Coyle, Fletcher, to secure the note and as an accommodation to Jane Armstrong, indorsed the note on the back thereof. That afterwards, and before the note became due, Coyle transferred the same to Bradley, Marsh & Co. That S. L. Marsh, one of the members of the firm of Bradley, Marsh & Co., before the note was due, transferred the same to Levi Anderson. That afterwards, and before said note became due, F. A. Fletcher indorsed on the back his waiver of demand and protest, as follows:

"I hereby waive notice of protest for non-payment.

"(Signed)

F. A. FLETCHER."

And that by reason of said indorsement of said note by F. A. Fletcher aforesaid, and his said waiver of notice of non-payment, he, the said F. A. Fletcher, became, and now

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is, liable for the payment, etc. That the note belongs to the plaintiff and is wholly unpaid.

To this complaint, defendant Fletcher interposed a demurrer upon the ground that it does not state facts sufficient to constitute a cause of action. The court having sustained the demurrer, judgment was rendered against the plaintiff for costs, from which an appeal has been taken to this court.

The objection to the complaint is: That the respondent is sued as an indorser without any allegation of demand of payment being made upon the maker when the note became due; nor is there any excuse for the failure of such demand shown. On the other hand, it is claimed that demand and notice of non-payment were specially waived by an indorsement on the note before due in these words: "I hereby waive notice of protest for non-payment." Signed by the indorser. The question for determination is whether this operated as a waiver by the indorser of demand of payment, as well as a notice of such non-payment. We think it did not so operate. The general rule is that agreements of this character are to be construed strictly, and not extended beyond the fair import of the terms thereof. (Story on Promissory Notes, sec. 272; *Berkshire Bank v. Jones*, 6 Mass. 524; 19 Pick. 375; *Backus v. Shepard*, 11 Wend. 629.)

In this case, the indorser does not say that he will waive demand of payment, but that he will "waive notice of protest for non-payment." Demand and notice are two distinct things, both of which are necessary to charge an indorser, and only one of them is waived by the indorser in this case. But it is claimed by appellant that the indorsement operated as a waiver of both, and the following decisions are cited to sustain the proposition. (*Coddington v. Davis et al.*, 3 Denio, 16; *Matthey v. Galley*, 4 Cal. 63; 19 Ind. 110.)

In *Coddington v. Davis*, the indorser wrote to the holder as follows: "You need not protest. T. B. C.'s note due, etc. I will waive the necessity of protest." This was held sufficient to dispense with a presentment and notice of non-payment, on the ground that the word "protest," as used by the indorser, in connection with the promissory note, was under-

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stood to mean the taking of such steps as were required by law to charge an indorser; that is, protest was understood to include both demand and notice. Although in a technical sense, the term protest means only a formal declaration drawn up and signed by the notary, yet as used by commercial men it includes all the steps necessary to charge an indorser. (Burrill's Law Dict. 349; 2 Ohio, N. S. 345.) The case in 4 California is in point, but not a single case is cited in the opinion to sustain it. The case in 19 Indiana does not come up to this case. There the agreement was that "protest and notice of protest were waived," and were held sufficient to include waiver of demand.

Thus it will be seen that none of the cases cited sustain the proposition of appellant except the California case, while there are numerous decisions holding the contrary doctrine. (6 Mass. 524; *Freeman v. O'Brien*, 38 Iowa, 406; *Scott v. Green*, 10 Penn. St. 103.)

The judgment of the court below is affirmed, and case remanded to the court below for further proceedings.

Judgment affirmed.

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10 547

J. B. CROSSEN, APPELLANT, v. R. P. EARHART, SECRETARY OF STATE, RESPONDENT.

MILEAGE—SHERIFF CONVEYING PRISONERS.—A sheriff is not entitled to mileage in addition to other fees prescribed in section 5 of the laws of 1874, prescribing the fees of sheriffs for transporting a convict to the state penitentiary. Said section 5 prescribes all the compensation a sheriff is entitled to for such service.

APPEAL from Multnomah County.

This case is a petition for a writ of mandamus to require the respondent, as secretary of state, to audit, allow, and issue a warrant on the treasury for thirty dollars, which appellant claims to be due him for mileage in conveying a prisoner, convicted of felony, from the Dalles to the penitentiary at Salem, the appellant being sheriff of Wasco county, and charged with the duty of conveying said prisoner as aforesaid.

Argument for Appellant.

The court below sustained the demurrer and gave judgment, from which this appeal is taken.

Shattuck & Killin, for appellant:

The amount here involved is small, but the question applies to all the sheriffs in the state, and to every prisoner. This mileage is claimed under the express provisions of law. Every statute of this state since 1855 which has attempted to regulate in a general way the fees of officers, has contained in letter or substance this general provision: "Every officer or person whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed shall be entitled to mileage, at the rate of ten cents per mile, in going to and returning from the place where the service is performed." (Sec. 14, p. 605 of the Code; sec. 18, p. 483 of laws of 1855.)

This is a provision of law, particular or special in its character, but general in its operation. Through all the changes, amendments, and repeals and re-enactments of the fee bill, or portions of it, this provision has stood unrepealed and untouched until 1876 (Laws of 1876, p. 34), when it was re-enacted in the same words, with a proviso that it should not apply to assessors. And this re-enactment in 1876, excepting assessors out of its provisions, makes it conclusive that it was the legislative intent to allow sheriffs mileage for the service in question.

The act of 1874 (p. 125, sec. 5), did not in terms repeal this section 14, nor does it do so by implication, for there is no repugnance, either in letter or spirit, between section 14 and the act of 1874; for the rule is that a general statute without negative words will not repeal the particular provisions of a former one, unless the two are irreconcilably inconsistent. (Sedg. Stat. and Const. Law, 123-128; Smith Com. 879, and authorities cited; 21 Penn. St. 42, 43; 70 Id. 346.) The act of 1874 is not a separate and independent act. It is a substitute, and nothing more, for sections 2 and 4, etc., of the tit. 1, chap. 20, of the General Laws, and section 14 of the latter, re-enacted by the statute of

Argument for Respondent.

1876 (p. 34), applies to the act of 1874. Otherwise there is no law whatever allowing a sheriff mileage for any service whatever, an oversight of which we cannot presume the legislature guilty. It is said that the travel in this case is itself the duty or service performed, and that *per diem* is provided, and no mileage can be allowed, but this is straining the meaning out of words. "Conveying and delivering him" surely imply something more than merely traveling with him. It is a further duty to be performed outside of the sheriff's business office, and carrying the same responsibilities and liabilities of other public duties, and in addition, the necessity of travel.

The former statutes, in providing for the compensation of sheriffs for conveying and delivering a convict to the penitentiary, provided in the same paragraph for mileage, while this statute of 1874 does not mention mileage; but from this circumstance no argument can be drawn against the construction we claim. For the former statutes all allow mileage for the sheriff "and such convict." If mileage for the convict had not been provided, there would have been no necessity of mentioning mileage in the same paragraph in order to entitle the sheriff to claim it, because section 14 had already provided for it, and to have mentioned mileage in the act of 1874, or in any provision where the convict was not coupled with the sheriff in drawing mileage, would have been simply surplusage.

Dolph, Bronaugh, Dolph & Simon, for respondent:

In sustaining the demurrer, the court below gave the following written opinion:

"Prior to 1874, the fees of county clerks and sheriffs were provided for in sections two and four of chapter twenty, of the Miscellaneous Laws. Section four provided, among provisions for other service, that the sheriff should have 'for conveying a convict to the penitentiary and delivering him to the proper officer thereof, four dollars per day, besides mileage for himself and such convict, besides the necessary expense incurred in guarding such convict during such conveyance, to be paid out of the state treas-

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ury.' The compensation here provided for applied to the sheriff of Wasco county. In the same chapter—chapter twenty, *Miscellaneous Laws*—it was provided as follows: 'Every officer whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage at the rate of ten cents per mile, in going to and returning from the place where the service is performed.' (Sec. 14, chap. 20, *Misc. Laws.*) The supreme court having held that this provision only applied to officers whose fees were provided for in that part of the chapter which preceded this section, the legislature of 1876 so amended it as to make it applicable to every case provided for in the chapter, excepting only the case of assessors. This amendment, however, does not affect the question presented in this case.

"In 1874, the legislature passed an act entitled "An act to repeal sections two and four of an act approved October 23, 1872, entitled," etc. These were the sections which provided for the fees of sheriffs and clerks. The first section of this act repeals sections two and four of chapter twenty, *Miscellaneous Laws*, prescribing the clerks' and sheriffs' fees, in express terms. The second section provides a table of fees for county clerks. The third, fourth, fifth, and sixth sections of the act prescribe the fees of sheriffs. Section five is as follows: 'The sheriff shall receive for conveying a convict to the penitentiary, and delivering him to the proper officer thereof, three dollars per day for each day actually engaged, besides necessary traveling expenses for himself and such convict, and the necessary expense incurred in guarding such convict during such conveyance, to be paid out of the state treasury; *Provided*, That where there is direct communication, either by railroad or by steamboat, from the place from which said convict is to be conveyed to the penitentiary, no allowance shall be made for guards.' This provision differs from that contained in section four, repealed by this act, in this, that it allows the sheriff three dollars per day instead of four dollars, for conveying convicts to the penitentiary, and instead of mileage

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for the sheriff and convict, it allows him necessary traveling expenses."

"Counsel for the petitioner claims that the effect of this act of 1874, so far as it relates to the compensation of sheriffs, is merely to amend section four, of chapter twenty, of the Miscellaneous Laws, and that the provision for mileage for all officers whose fees are prescribed in that chapter, and who are required to travel, therefore applies to the case of sheriffs when they convey convicts to the penitentiary. In support of this view, it is argued that unless this act be construed to be amendatory, and a part of chapter twenty, of the Miscellaneous Laws, the legislature will have done a 'wrong' to sheriffs, since the provision for mileage in any case only applies to persons whose fees are prescribed in that chapter. The act of 1874 is by its terms an independent act. It provides a complete table of fees for sheriffs and clerks. It does not purport to amend any part of chapter twenty, referred to. It expressly repeals certain sections in that chapter, and enacts other sections in lieu of those repealed. The new enactment does not correspond with the old statute in the number of the sections, or in their arrangement. Thus, the services and fees prescribed for the sheriffs in sections three, four, and five of the new act are embraced in four, five, and twelve of the old one, and the provision in relation to conveying convicts to the penitentiary, which constitutes the whole of section five in the new act, is a portion of section four in the old one, while section five in the latter act relates to the fees of coroners, and is not repealed. A new rule of construction will have to be discovered before the act of 1874 can be held to be amendatory of the old law in the particulars claimed in the argument.

"The object of the new act, as appears from the emergency clause expressed in it, was to reduce the fees of clerks and sheriffs. The taking away of the sheriff's mileage is consistent with the main object of the act. If the legislature carried this reduction to an unreasonable extent, the judges are not for that reason to reject the act. 'For,' as Blackstone expresses it, 'that were to set the judicial power

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above that of the legislature, which would be subversive of all government.' I do not, however, place the decision of this question upon the ground that the new act is not amendatory of the old one. I assume for the purposes of this case that it is so amendatory, and that the sheriffs are entitled to mileage where they are required to travel in order to perform any service required of them in section 3 of the act of 1874.

"Assuming, therefore, that a sheriff is entitled to mileage, whenever he is required to travel in order to perform any public duty, the question still remains, is the travel which he performs in conveying convicts to the penitentiary, travel performed in order to enable him to execute a duty required of him, or is it in itself the duty required? When a sheriff serves a subpoena or summons he is entitled to receive twenty-five cents for the service. He may be required to travel fifty or more miles to perform the duty. In such case the duty is one thing, the travel another. The compensation is for the performance of the duty, of which the travel is no part. The conveyance of prisoners to the penitentiary necessarily includes travel. To 'convey' a prisoner to the penitentiary is in every case to travel to the penitentiary and transport or carry the prisoner there. The travel is a necessary and principal part of the service of conveying, for which the statute allows three dollars per day. If the statute, instead of providing that the sheriff shall receive three dollars for every day he is actually engaged in conveying convicts to the penitentiary, had provided that he shall receive ten cents per mile for the service of so conveying convicts, the argument now made would have applied with no less force than it now does. Whether the compensation for the service performed be measured by the time consumed in the act of conveying or by the distance traveled, the construction of the statute must be the same.

"To say that a sheriff is entitled to three dollars per day and expenses of travel and guards for conveying convicts, and to ten cents per mile for all travel performed 'in order' to convey, would be a solecism in words and in legislation.

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There is no other service aside from that of traveling in the act of conveying prisoners, to which the *per diem* provided for can apply. It is not intended to compensate him for consenting to be sheriff, for enjoying the honors or bearing the responsibilities of official existence. These do not come within the language of the provision which describes the service. The effect of the construction contended for would be to make the compensation of sheriffs for this service greater under the act of 1874 than it was under the old law, and yet the intention of the legislature was, as it appears in the act, to reduce the compensation of sheriffs and clerks. The provision allowing the sheriff three dollars per day for the time actually employed in conveying convicts to the penitentiary, besides necessary traveling expenses for himself and such convict and the expense of guarding such convict, includes all the compensation which he can receive in consequence of such service."

With the lucid statement of facts and conclusive argument contained in the forgoing opinion, we might well rest the case, but we will briefly state the reasons why we think the petitioner not entitled to mileage as claimed by him.

Section 14, of title 1, of chapter 20, of the Miscellaneous Laws of Oregon, as amended by the act approved October 20, 1876, provides only for mileage in addition to the fees prescribed by chapter 20. The amended section is as follows:

"Section 14. Every officer or person whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees prescribed in this chapter, shall be entitled to mileage at the rate of ten cents per mile in going to and returning from the place where the service is performed, except assessors, who shall not be entitled to mileage."

While the act of 1874 does not professedly and in express terms repeal the provisions of chapter 20 of the Miscellaneous Laws, in regard to sheriffs' fees, yet being a new and independent act, repugnant to the previously existing law on the same subject, the former statute was thereby necessarily superseded and in effect repealed. (5 Or. 152; Id. 243; Id. 275.) Wherefore, the fees of sheriffs were not "pre-

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scribed in this chapter" 20, but were prescribed by the act of 1874, at the time when section 14, of title 1, of chapter 20, was amended by the act of October 20, 1876, and sheriffs are therefore not entitled to the mileage of "ten cents per mile" allowed by the act of 1876, to officers whose fees were then prescribed in said chapter 20 of the Miscellaneous Laws.

"A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as on reason and common sense, operate to repeal the former." (Smith's Stat. and Const. Con., sec. 786; 7 Mass. 142; 12 Mass. 545.) "When some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled." (Smith's Stat. and Const. Con., sec. 785; 12 Mass., 537; 1 Pick. 43.) There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy. * * * And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. (1 Bl. Com. 87.)

The mischief intended to be remedied by the act of October 29, 1874, is expressed in the emergency clause of that act to be that "the present fees of clerks and sheriffs are manifestly too high, and are therefore an unnecessary burden upon the taxpayers." It would be a startling method of construction, indeed, if the judges should precisely reverse the above canon, and "so construe the act as to suppress the remedy and advance the mischief," by allowing to sheriffs ten cents per mile under the act of 1876, contrary to its letter, beside the fees and traveling expenses allowed by the act of 1874, thus increasing their compensation above what they were entitled to receive under the provisions of chapter 20 of the Miscellaneous Laws, which the legislature declared to be "manifestly too high."

And, further, the point made by his honor the judge of the court below, in his opinion in this case, that the "conveying" of a prisoner to the penitentiary is within itself the

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very "duty to be performed," under the provisions of either sec. 4, of chap. 20, Misc. Laws, or of sec. 5 of the act of October 29, 1874, which duty necessarily includes the act of traveling in order to "convey," is so unanswerably sound, and conclusive of the question at issue, that any attempt on our part to elaborate his argument in that behalf would detract from its conciseness without adding to its force.

By the Court, BOISE, J.:

In this case we are called on to construe section 5 of the act of the legislature approved October 29, 1874, providing for the fees of clerks and sheriffs. Said section is as follows: "The sheriff shall receive for conveying a convict to the penitentiary and delivering him to the proper officer thereof, three dollars per day for each day actually engaged, besides necessary traveling expenses for himself and such convict, and the necessary expenses incurred in guarding such convict during such conveyance." This section is a substitute for a former section of the general laws. See Statutes, 603, which provides that the sheriff shall be allowed "for conveying a convict to the penitentiary and delivering him to the proper officer thereof, four dollars per day, besides mileage for himself and such convict, besides the necessary expense incurred in guarding such convict during such conveyance."

In the section last above quoted, mileage was expressly given to the sheriff for himself and convict; in the latter, this provision is left out, and in lieu thereof the sheriff is given his necessary traveling expenses for himself and such convict. It is claimed that in addition to the allowances in this section, the sheriff is also entitled to charge mileage, under section 14 of chapter 20 of the general laws, see p. 605. This section provides that "every officer whose fees are prescribed in this chapter, who shall be required to travel in order to perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage, at the rate of ten cents per mile, in going to and returning from the place where the service is performed."

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A question is made that the sheriff is not one of the officers whose fees are prescribed in the chapter referred to. But suppose it be granted that he is such a person, did he have to travel to a place where this duty was to be performed? The duty to be performed was to convey a convict to the penitentiary. The place where the conveyance (which was the duty to be performed) commenced, was at the county jail where the convict was confined, and extended to the penitentiary. The conveyance was the transportation of the prisoner over the journey, and the responsibility and guarding of the prisoner commenced at the jail and continued along the whole journey, as much as the responsibility in the transportation of freight commenced at the place where the common carrier receives it of the consignor, and continues to the place of delivery to the consignee. The travel was included in the conveyance. If the sheriff is required to summon a juror, his duty is the service which must be performed where the juror is, and if he does not find him, the duty cannot be performed in whole or in part.

But if he is required to transport property from Salem to Portland, and he takes the property at Salem, the service begins to be performed when he takes the property, and continues until he has finished the transportation; the duty to be performed necessarily extends over a certain definite space, and travel is a part of the duty, as much as reading a summons is part of the service. If any travel could be charged in this case for going to the place of performance, it would be for going to the county jail to find the prisoner, for there is where the duty to be performed must commence. We think it was the intention of the legislature to fix in this section 5 all the compensation which a sheriff should be entitled to for this service.

The judgment of the circuit court will be affirmed.

Statement of Facts.

STEPHEN G. SPEAR, APPELLANT, *v.* J. W. COOK AND V. COOK, RESPONDENTS.

RIGHT OF WAY TO FLOW WATER—GRANT CONSTRUED.—Where S. granted to C. all the water in a certain creek, and the right to convey such water over the land of S. to the land of C., and granted to C. the right “to enter upon lot one (land of S.), and build, maintain, repair, and keep up and in operation, all claims, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of said C.,” such conveyance gives to C. the right to construct several canals or courses for the water over said premises of S.

IDEM.—By such conveyance, the grantee has the right to convey all the water, and at different times and places.

IDEM.—Such grantee may first construct a ditch and take part of the water, and afterwards construct another ditch to convey the balance, or enlarge the first ditch.

IDEM.—Such grantee may also change his ditch when located, if such change is necessary to enable him to convey the water in a convenient and reasonable manner.

IDEM—RIGHT TO FLOAT WOOD.—Such grantee may also float wood through his ditch, provided he does not thereby injure the grantor.

APPEAL from Clatsop County.

This is an action for damages brought by appellant against respondents for an alleged trespass claimed to have been committed by them, in entering upon, and building a flume across, certain lands of appellant, and in floating wood through the flume, and thereby causing water to overflow, and portions of said wood to be cast upon the lands of the appellant.

Respondents deny that they were guilty of a trespass in doing any act alleged in the complaint, but justify their acts and doings in the premises under a claim of right by virtue of the grant contained in a certain deed, executed by appellant to one of them, by which deed the appellant granted to the respondent, James W. Cook, certain lots numbered 2 and 3, and also the water of the east fork of Spear's creek and the right and privilege to divert said water from its channel, and to convey it upon, over, and across said lots 2 and 3, and also to enter upon lot 1, the premises in question, and build, and maintain, and repair, and keep in operation all dams, ditches, pipes, aqueducts, or flumes,

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necessary and proper for conveying said water to said premises so conveyed to J. W. Cook, one half of which grant has since passed to the respondent, V. Cook.

The appellant, replying to the matter thus set up, alleges that the deed in question does not specify the place or line upon which the flume should be constructed, and that soon after the execution of the deed, J. W. Cook, with the appellant's acquiescence, entered the premises of appellant and located and constructed a flume under the grant and used the same to convey the water of the east fork of Spear's creek, until 1877, when the respondents constructed on a different route the flume complained of, and that the new flume is not necessary or proper for the conveyance of the water in question to the respondent's premises.

The testimony offered on the trial tended to show that the route of said new flume varies from the route of the old flume in its passage through appellant's land, at distances varying from six to seventy feet, as shown on said plat or diagram; that the old flume was generally constructed on the ground or on low trestles not exceeding five feet in height at any place, and was six inches square and made of boards, leaving an inside measurement of four inches square, and covered; was on a good grade, and conveyed the water of said east fork of Spear's creek across appellant's land to the lands of respondents freely and rapidly; that its capacity was sufficient to convey the water during the dry season of the year, but during the heavy storms of winter was insufficient, and sometimes during the summer, owing to certain angles in its construction, was liable to become partially obstructed by frog spittle and sediment, and required clearing every few days; that it was practicable to construct on the site, or location and grade, of this flume, a larger one, of capacity sufficient to carry all the water of said east fork of Spear's creek; that the defendants and their employes made a common pathway of this old flume in 1873 and 1876, and by means thereof had put it out of grade and caused it to leak, and interfere with the free passage of the water therein. That this flume nevertheless was used with the common acquiescence of both parties, for

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the conveyance of water for three seasons, and the location thereof was acquiesced in and assented to by plaintiff. That in the latter part of the year 1876, the defendants intimated a purpose to construct another flume for the conveyance of said water over plaintiff's said land, but were forbidden by plaintiff, and fully informed that such a structure in any other place than upon the route of the old flume was against plaintiff's will. That defendants, nevertheless, in January 1877, against plaintiff's protest, proceeded to construct a second flume across plaintiff's land on a route varying from the route of the old flume from six to seventy feet, and the same was constructed on high trestles, and in some places nailed to plaintiff's trees; was eight to ten times the capacity of the first flume, and had along its sides, upon the trestles aforesaid, plank walks, upon which people could pass and repass. That said flume was thereupon used by defendants for the purpose, not only of conveying water, but also of floating wood from lands owned by the defendants above plaintiff's premises, to defendants' cannery, upon the premises sold to J. W. Cook by plaintiff in 1873. That said flume was still insufficient to carry all the water of the east fork of Spear's creek in time of flood. That during the winter and the months of March and April, defendants used said flume for floating cord wood every year after its construction until the commencement of this suit; and the same became often obstructed, and the water overflowed therefrom on to plaintiff's improved lands, washed his lands, caused slides, obstructed his pathway and roads, destroyed his trees, injured his garden crops and strawberry beds, which he had on his land below said flume. That said flume itself, irrespective of the water which issued from it, was an obstruction to plaintiff's enjoyment of his land far greater than the flume which had been constructed in 1873, on the first route, and rendered the defendants' easement more onerous to plaintiff, and that he was damaged thereby in a considerable sum. That to all these proceedings of defendants in constructing and operating said flume built in 1877, plaintiff has continually ob-

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jected and protested. That the old first flume, constructed in 1873, still remains upon the plaintiff's premises.

The defendants, to establish the issues on their part, introduced in evidence plaintiff's deed of August 12, 1873, to J. W. Cook, and also introduced evidence tending to show that the flume constructed in 1873 was insufficient to convey the water of said creek to defendants' premises. That the same was too small in size, and was located along a very abrupt mountain side, and following around the points of the hills contained several sharp angles, which frequently filled with mud and sediment, and obstructed the flow of the water until cleaned out. That the line of the old flume was very crooked, and the flume insufficient in size, and because of its location, to convey the water at all seasons of the year. That the new flume is more nearly on a straight line, affords an easier flow to the water, and is also insufficient in size to convey all the water granted by plaintiff's said deed. That at the time when the new flume was constructed, the old flume had become rotten by decay in several places, so as to need rebuilding. That no damage was done to the trees, grass, or land of the plaintiff in constructing the new flume, and that no damage has since accrued to plaintiff in any particular therefrom. That the new flume is substantially upon the line of the old flume for the greater portion of its route, and the furthest departure therefrom is only about thirty feet at one point, and twelve to fifteen feet at another point.

That defendants had employed a force of men to tend their flume while floating wood therein, and the obstruction thereof, and the overflow therefrom, was accidental and temporary, and that plaintiff had not been injured in any respect thereby. That the water of which plaintiff complained, and which he alleged had injured his crops and improved land and fruit trees, arose from natural springs, and did not proceed from the flume. The jury also, under the direction of the court, and in charge of the sheriff, viewed the premises, and thereupon the cause was submitted to the jury; the court, of its own motion, delivering to them a general charge in words following:

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1. By the deed in question the defendant had the right to construct, over and across plaintiff's land, all ditches, flumes, and aqueducts necessary to convey the water of the east fork of Spear's creek to his fishery. The deed does not define or limit the place in which the pipe is to be laid, nor the size and character of the flume, ditches, etc., except as the latter is defined by the stipulation that the ditches, flumes, etc., are to be of such size and character as is necessary to the conveyance of the water of the creek in question.

2. Under this deed, after Cook had once constructed his ditch or flume, and thus selected the place where he would exercise the easement granted, such easement could not be exercised in any other place. If he once exercised the right granted in a fixed and definite course, with the full acquiescence and consent of Spear, he can not change the course of his ditch, or the manner in which his right is to be exercised, at his will.

3. That this rule must be understood with the reasonable qualification that Cook, the grantee, is not necessarily confined to the precise location in all its parts which he has selected. It is enough if the location is substantially the same. If it followed substantially the same route, the fact that it deviates in places from the old line will not necessarily preclude the defendant from exercising his right upon the new line.

4. The rule which I have stated is the general rule. To this rule there is this exception, if the grantee of a right of way for flumes, ditches, etc., to convey or lead water, locates and constructs his flumes and ditches, and it turns out, from experiment made, that the flumes or ditches as located, will not, through mistake in the grade or location, answer the purpose, that it will not conduct the water to the intended place, then, in that case, the grantee may change the location and direction of his ditch or flume altogether. He is not allowed to do this as a matter of his own convenience, but is allowed to do it if it is a matter of necessity. If in this case, through mistake or bad engineering, Cook's ditch was so constructed that it would not

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answer the purpose which the right secured in the deed was intended to effect, then, in that case, he has the right to construct a new ditch on a different grade, and in another location, keeping as close to the old location as the requirements of his ditch will permit.

5. The same rule applies so far as the size of the ditch complained of is concerned. The size of Cook's ditch is defined in the deed. It is to be large enough to convey certain water. He would have no right arbitrarily to enter upon plaintiff's land and construct new flumes without limit, because the old ones were not large enough to convey all the water provided for in the deed. And yet, if through mistake he so constructed his first ditch that upon experiment it was found not to be large enough to answer the purpose, he will not be precluded from constructing a new flume or ditch of sufficient capacity.

6. You will therefore determine whether the new ditch substantially follows the course of the old one. If you find that it does not, you will determine whether the changes made in the location are necessary to avoid defects in the old ditch, which prevented the old ditch from answering the purpose for which it was intended.

7. If you find that the new ditch does not substantially follow the line of the first location, and that the change was not necessary, then you will determine how much the plaintiff is damaged by the new location.

8. If you find either that the new location substantially follows the old one, or that it is necessary that it should deviate on account of the bad location of the old ditch, then plaintiff is not entitled to recover, although the new ditch is larger than the old one, unless the new ditch has been so constructed as to unnecessarily damage plaintiff's land, or the size of the ditch is greater than is necessary to convey the water of Spear's creek, and such increased size has the effect to damage plaintiff.

9. If you find that plaintiff is entitled to recover, then you must find for him in such damages as he has actually sustained. The actual injury to his land, to his orchards, or timber, or pastures, or garden, etc. You are not to find

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speculative damages—that is to say, what the value of trees killed, or of a garden destroyed, if such there has been, would be proper to be considered; yet the expected profits from the sale of the products of the orchard or garden can not be considered by you; such damages are too remote and uncertain to afford a safe guide in estimating injuries of the kind alleged in this case.

The appellant requested the court to give the following instructions:

“1. If the jury believe from the evidence that the defendants, immediately after the execution of the deed by Spear to J. W. Cook (described in the pleadings), proceeded, with the acquiescence of Spear, to locate and construct a flume for the purpose of conveying the water of the east fork of Spear’s creek across plaintiff’s premises, and that such location was used and the water so conveyed for three years, and that the grade of that flume was sufficient to pass the water, then Cook had no right to change the location without Spear’s consent, and the change of location in 1877, if against the will of Spear, was unlawful, and the plaintiff is entitled to recover.”

When the court gave, but added thereto an oral qualification referring to instructions already given, and in substance saying to the jury, that if by experiment the old flume, by reason of its location or form of construction, was found to be defective, and that a larger and different structure and a more direct route were necessary to convey all the water of the east fork of Spear’s creek, then the new flume was lawful.

“2. If the jury believe from the evidence that the old flume failed to carry the water required, by reason of its form and size, and not by reason of its mistaken grade, and that the new location in 1877 was taken and the new flume built, mainly because of its being a route more convenient for Cook and cheaper than the old route, they should find for the plaintiff.”

Which the court refused.

“3. If the jury believe from the evidence that the right of way for conveying the water, though granted by the deed

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in general terms, without fixed and defined limits, was immediately exercised by Cook on a route selected by him and assented to by Spear, and that such route was used for three years, from 1873 to 1877, with like assent, then the jury should hold and find that such selection and use operated as an assignment of Cook's right, and must be deemed to be the route intended to be conveyed by the deed, and the same in legal effect as if it had been fully described in the deed, and any change of route by Cook without Spear's consent, is unlawful, and entitled Spear to a verdict for such damages as he has sustained and proven."

And the court refused to give said instructions simply as asked, but gave the same with a modification or qualification referring to instructions contained in the general charge, and in the instructions before given, and in effect said verbally to the jury that if the old flume, by reason of its shape, angles, and mode of construction and location, did not prove sufficient to carry the water of the creek, and a new route and a new flume were necessary for that purpose, then the defendants had the right to make the change.

"4. The question to be determined in this case is not the right to make a larger or differently shaped flume than was built in 1873, but the right to change the location and route. Cook had by his deed a right to convey the water of the east fork of Spear's creek across plaintiff's land, and having selected his route or location, he might there build a flume sufficient for that purpose; but if he selected a route and used it for three years with the acquiescence of Spear, he had no right to change it to another and different location, nor had he any right to make use of his easement more onerous to Spear than it was or would be on the line of the first location."

The court refused to give said instructions simply as asked, but gave it with a qualification or modification, referring to former instructions given, and in effect said to the jury that if the old location was a bad one and the water would not pass freely by that route, and the old flume was found to be insufficient for the purposes of the grant, then

Argument for Appellant.

the defendants had the right to make a different structure, and in a place more suitable for the object intended.

"The grant by Spear to Cook was simply a grant of a right of way, and the right to construct a passage to convey water, and any use of the easement for transportation of wood was in excess of the grant, and any change of route or of the form of the flume, not necessary for the mere conveyance of water, was unlawful, and subjected Cook to the action for damages."

And the court refused to so instruct the jury, but gave such instructions with the additions in effect as follows: "That Cook had a right to construct a flume that would carry all the water of the creek, and if the water conveyed was sufficient to carry wood, then Cook had the right to use his flume and the water therein to convey wood, provided he did not thereby injure plaintiff.

Shattuck & Killin, and O. F. Bell, for appellant:

The right of way for conveying the water, granted in general terms, without a specific location in the deed, became fixed and defined, when Cook exercised the right by selecting a route and building the flume thereon in 1873, with Spear's assent, and using it for three years with like assent; and that such selection and use operated as an assignment of Cook's right, and must be deemed to be the route intended by the parties to be conveyed by the deed, and the same in legal effect as if it had been fully described in the deed, and any change from that route without Spear's consent is unlawful, and entitles Spear to a recovery for such damages as he proved, which is the purport of instruction 3, asked by plaintiff. (2 Allen, 128.)

A right of way, whether for travel or conveying water, granted without any designation of the place in the deed, becomes located by usage, and being so located it can not afterwards be changed by the grantee. (Same case, and 12 Johns. 221; 3 Mas. 272; 11 Gray, 426, 427; Angel on Watercourses, 557, 558; 71 N. Y. 196; Wash. on Easem. 225; 1 Pick. 486.) The only exception to this general rule is when the first location is upon an insufficient or mistaken

Argument for Respondents.

grade, so that no benefit accrues to the grantee. (Wash. on Easem., 55, subd. 20; 4 Vt. R. 199; 49 Barb. 646.)

Dolph, Bronaugh, Dolph & Simon, for respondents:

If the grant had been of the right to construct "a flume," or "an aqueduct" necessary and proper to carry the water of said creek, and one such conduit had been laid which by experience was found to be too small, and to be upon such a grade, and to contain so many sharp angles, as to render it incapable of containing and conveying the water of the creek, respondents would even in that case have had the right to alter the size, grade, shape, and location of the flume, so as to enable them to receive and enjoy the benefits granted to them, particularly if they adhered substantially to the route of the old flume, and made only such alterations in size and grade as were essential to the given purpose. And yet the rights of respondents were, by the instructions, virtually limited to the same extent, under the terms of this far more comprehensive conveyance. Grants of this nature are construed as having reference rather to the quantity of water to be taken and used, than to the purpose for which it shall or may be applied; and in these cases, as in others, the rule prevails that the terms of the conveyance are to be construed most favorably for the grantee. (3 Pars. on Cont. 533, 534; Wash. on Easem. 349, 350; *Cromwell v. Selden*, 3 Comst. 255-60; *Olmsted v. Loomis*, 9 N. Y. 426, 427; *Beals v. Stewart*, 6 Lansing, 408; *Van Rensselaer v. Alb. R. R. Co.* 1 Hun. (N. Y.) 507; *Borst v. Empie*, 5 N. Y. 33.)

If the respondents had the right, under the grant to them, to enter upon the premises of appellant and there construct the new flume, as a necessary and proper conduit of the water of the creek, they can not be converted into trespassers for floating wood down their own flume, even though appellant was thereby damaged. The remedy would be by special action on the case. Beside which, the attempt to introduce this new feature into the case by the reply, was a clear departure from the cause of action stated in the complaint, and that portion of the reply should therefore have been stricken out as irrelevant. (11 How. Pr. 36; 4 Wend.

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643; 2 Cai. 320; 3 Johns. 367; 5 Duer, 660; 13 How. Pr. 97; 46 Vt. 29; 1 Hill on Torts, 106, 107; *Adams v. Rivers*, 11 Barb. 390; *Allen v. Crofoot*, 5 Wend. 506; *Six Carpenters' Case*, 1 Sm. Lead. Cas. 216; *Van Bruell v. Schenck*, 13 Johns. 414; *Hunnewell v. Hobart*, 42 Me. 565; *Dingly v. Buffum*, 57 Maine 379.)

By the Court, BOISE, J.:

The defendants justify the trespass complained of under a grant from the plaintiff of an easement or right to use the premises which are the subject of the alleged trespass, for the purpose of conveying the water over the same. It appears from the allegations of the answer, that the plaintiff, in August, 1873, conveyed to J. W. Cook, defendant (and grantor of V. Cook), a parcel of land in lots 2 and 3 in section 5; and further, a grant of the water of the east fork of Spear creek, and the right and privilege to divert said water from its natural channel, and convey it upon and across said lots 2 and 3, conveyed to said Cook; and also to enter upon lot 1 in section 6 (plaintiff's), and build, maintain, and repair, and keep up and in operation, all dams, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of said Cook. The rights of the parties in this case must depend on the construction of this instrument.

1. The defendant, by this instrument, became the owner of all the water of the east fork of Spear creek.

2. The deed gives them the right to convey the same over said lot 1 to lots 2 and 3, but is silent as to the location of the part or parts of said lots to which the water may be conveyed.

The grant is that the defendants may enter on lot 1 and construct and maintain all dams, ditches, pipes, aqueducts, or flumes necessary and proper for such conveyance. This grant is very broad, and gives the defendants the right to take the water over said lot 1 in several channels or courses, if such should be necessary, in order that they may use it for several distinct purposes on said lots 2 and 3; that is, defendants may use it to supply a cannery on one portion

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of said lots, and run one or more mills on other portions. Such is the natural and obvious meaning of the language used, and the instrument is to be construed strictly towards the grantor and to effectuate the object of the grant. (3 Pars. on Cont. 533, 534.) The deed grants the water to defendants to be used on lots 2 and 3, and as the use to which the water is to be applied is not named, the presumption is that it can be used for any purpose the defendants may desire, and at such time in the future as may suit their convenience.

The defendants purchased and owned all the water of Spear creek, and the right to convey it over lot 1 in one or more channels. Suppose in 1873 defendants wished to divert a part of this water to their cannery, and constructed a flume for that purpose, which was sufficient to convey only a part of said water, the whole not being needed for that establishment, they did not thereby lose their right to take the balance of said water when they should need it, either for their cannery or for any other purpose. The purchase was of all the water and the right to convey it over said lot, and the defendants can not be supposed to have located their easement on said lot 1 until they have established channels sufficient to convey the water. If the defendants had constructed one or more passages for the water, which were sufficient for the purpose of conveying it, and had established the location of its entire use, then they might be deemed to have located their easement on this lot, and fixed its limits. But whether or not they had done this, it being a matter in parol, would be a question of fact to be established by evidence. Such being, as we think, the proper construction of this conveyance, we will consider the questions presented by the bill of exceptions, being objections taken to portions of the instruction given by the court to the jury in the trial of this case in the circuit court.

It is claimed that the court erred in instructing the jury that Cook, in constructing his new flume, was "not necessarily confined to the precise location of the old flume in all its parts." It is enough, says the court, "if the location is

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substantially the same. If it followed substantially the same route, the fact that it deviates in places from the old line will not necessarily preclude the defendant from exercising his right upon the new line." We think this instruction was proper, for it might be necessary to deviate in order to avoid defects which so far impaired the easement as to render it valueless; and the question whether it did substantially follow the old line was a matter for the jury, and a necessary deviation by the defendant would not be a violation of his easement, provided he had already located and used a definite line.

The next error claimed is to the following instruction: "If, through mistake, he (Cook) so constructed his first ditch that upon experiment it was found not to be large enough to answer the purpose, he will not be precluded from constructing a new flume or ditch of sufficient capacity." We think this construction is correct, for the reasons stated above, because Cook owned all the water, and had a right to a ditch of sufficient capacity to bring it; otherwise, his grant would be in part defeated.

What we have said in reference to the plaintiff's objections to instructions numbers three and five is sufficient to dispose of the objections to instructions six and eight, which involve the same questions. The foregoing are objections made by the plaintiff to the general charge of the court.

The court then gave certain instructions asked for the respondents, which appear in the foregoing statement of the case, to all of which instructions the plaintiff excepted. We think all these instructions correct, and they are in accordance with the views heretofore expressed, which we have already said in construing the conveyance by which respondents claim, and it will not be necessary to repeat these views here, or further consider the questions presented by these instructions.

The plaintiff then asked certain instructions, which were given with certain modifications, which modifications were excepted to. These instructions and modifications are also set out in the foregoing statement of the case. These instructions, except the last, number five, raise no questions differing

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materially from those already discussed, and need no further notice. Instruction number five is as follows: "The grant by Spear to Cook was simply a grant of a right of way and the right to construct a passage to convey water, and any use of the easement for the transportation of wood, was in excess of the grant; and any change of route, or of the form of the flume, not necessary for the mere conveyance of water, was unlawful, and subjected Cook to the action for damages."

The court refused to so instruct the jury, and gave such instructions with the addition in effect as follows: That Cook had a right to construct a flume that would carry all the water of the creek, and if the water conveyed was sufficient to carry wood, then Cook had the right to use his flume and water therein to convey wood, provided he did not thereby injure the plaintiff.

All the questions presented by the several propositions contained in this instruction, except the right of the respondent to float wood in their flume, have been sufficiently noticed in what we have already said in defining the rights of the respondents under the conveyance by which they justify. The court simply said to the jury that the respondents had a right to float wood in the water conveyed, if they did not thereby injure the plaintiff.

The object of the instruction asked was to have the court say to the jury that the floating of the wood was unlawful, and that the doing of this unlawful act was a trespass, and would entitle plaintiff to nominal damages without the proof of any actual injury. We think the flume and the water was the property of the respondents, and that they might use them in any manner they pleased, if they did not thereby injure the plaintiff, and were only responsible to the plaintiff for actual damages caused to plaintiff by such use, and the question of actual damages caused by floating the wood, was properly left to the jury.

We think there were no substantial errors in the instructions of the circuit court, and the judgment will be affirmed.

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THE STATE OF OREGON, RESPONDENT, *v.* THOMAS DUCKER, APPELLANT.

LARCENY—MONEY PAID BY MISTAKE.—One who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud the owner thereof, is guilty of larceny.

BILL OF EXCEPTIONS—WHEN SILENT, WHAT PRESUMPTIONS ARISE.—Where a bill of exceptions is silent as to whether certain instructions were given which are necessary to sustain the judgment, it must be presumed that they were given, and especially where it appears that other instructions were given which are not specifically set out therein.

APPEAL from Clatsop County.

The appellant was indicted for the crime of larceny, was tried, convicted, and sentenced to three years imprisonment. The facts constituting the alleged larceny are briefly these: The appellant asked one Theodore Bracker to change a ten-dollar gold piece for him. Bracker did so; but by mistake, instead of giving the appellant a ten-dollar roll of silver pieces, gave him a roll consisting of ten twenty-dollar gold pieces, or two hundred dollars in gold, instead of ten dollars in silver. This money the appellant converted to his own use, and refused to make any restitution or give his note therefor, although at the time of discovering the mistake he had reason to know that it belonged to Bracker.

Ball & Gregory, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for the state.

By the Court, PRIM, J.:

The indictment charges the appellant with the larceny of ten twenty-dollar gold pieces. At the trial, the court among other things charged the jury that "if the prosecuting witness delivered to the defendant ten twenty-dollar gold pieces under the belief that he was giving him that number of silver pieces, and the defendant so took them sharing the mistake, and if, upon discovering the mistake, the defendant

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knew or had the means of knowing who the owner of the gold pieces was, but he thereupon, nevertheless, converted them to his own use, it was larceny." This instruction is objected to on behalf of the appellant and assigned as error.

This objection, we think, is not well taken, as the instruction contains a correct statement of the case upon the point developed by the evidence in this case. The money in excess of that which the appellant was entitled to receive, was taken without the owner's consent, and that which was thus taken was appropriated to the appellant's use with an intent to cheat and fraudulently to deprive the owner thereof.

These two elements, being both present in this case, are sufficient to constitute the crime of larceny, for it will not do to say that the owner parted with his money voluntarily, and, therefore, there could not have been any unlawful taking. While it may be said that it was the physical act of the owner in handing that which was his to another, yet there was lacking his intellectual and intelligent assent to the transfer, upon which the consent necessarily depended. And so in the case "where money or property is obtained from the owner by another upon some false pretense, for a temporary use only, with the intent to feloniously appropriate it permanently, the taking thereof, though with the owner's consent, is larceny." (*Wolfstein v. The People*, 13 N. Y. Supm. (N. S.) 121; *The People v. McGarren*, 17 Wend. 460; *The People v. Crall*, 1 Denio, 120.)

It is further claimed by counsel for the appellant that the court was asked to charge, on appellant's behalf, as follows:

1. That unless the jury believed from the evidence that defendant intended to convert the money so received by mistake as soon as he discovered this mistake, the subsequent conversion was not larceny.
2. That if at any time after defendant discovered the mistake, and before conversion defendant honestly intended to return the money to Bracker (if Bracker was the person he received it of), then any subsequent conversion would not constitute larceny.
3. That the *animus furandi* must have existed as soon as

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defendant discovered the mistake, in order to constitute larceny.

It is claimed that these instructions were refused, and that the court erred in so refusing. The bill of exceptions being silent upon this matter, it must be presumed that they were given. The bill of exceptions says the instructions first complained of and heretofore referred to in this opinion, among others, were given without specifying what they were.

There being no substantial error in the record, the judgment of the court below is affirmed.

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THE STATE OF OREGON, EX REL. J. F. CAPLES, DISTRICT ATTORNEY OF THE FOURTH JUDICIAL DISTRICT OF SAID STATE, RESPONDENT, *v.* THE HIBERNIAN SAVINGS AND LOAN ASSOCIATION, APPELLANT.

CONSTITUTIONAL PROVISION CONSTRUED—BANKS MAY BE INCORPORATED.

Section 1, article 11, of the constitution of Oregon does not prohibit the establishment or incorporation of banks, excepting only banks and moneyed institutions with the privilege of making, issuing, and putting in circulation bills, checks, certificates, promissory notes, etc., to circulate as money.

APPEAL from Multnomah County.

This is an action brought by the district attorney of the fourth judicial district to test the validity of the appellant's corporate existence under the constitution of the state. The complaint is as follows:

Now comes the above-named plaintiff, on leave heretofore, for that purpose, granted by this honorable court, and for cause of complaint against said defendant alleges: That defendant is a corporation duly incorporated under and by virtue of the general incorporation laws of the state of Oregon, on the fifteenth day of November, 1879, having its principal office and place of business in the city of Portland, in Multnomah county and state aforesaid; that said corporation was incorporated and organized for the object and purpose of receiving deposits, making loans, and carry-

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ing on a banking business at Portland, Oregon. That since the incorporation of said defendant, said defendant, in said city of Portland and state aforesaid, has received deposits, made loans, and transacted a banking business, and by so doing has exercised franchises and privileges not conferred upon it by law, and not permitted by the constitution of said state of Oregon.

Wherefore plaintiff prays judgment that the said defendant be excluded from all corporate rights and privileges and franchises, etc.

The appellant, answering, alleges that it is now receiving deposits, making loans, and exercising such rights, franchises, and privileges, as are conferred upon it by law, by virtue of its articles of incorporation, a copy of which is hereto attached, and that it has exercised no other rights, privileges, or franchises.

ARTICLES OF INCORPORATION OF THE HIBERNIAN SAVINGS AND LOAN ASSOCIATION.

Know all men by these presents that we, whose names are hereto signed, desiring to incorporate ourselves into a private incorporation for the purposes and objects herein-after mentioned, under the laws of the state of Oregon, and in pursuance thereof, do hereby declare, publish, and agree to the following articles of incorporation:

Article 1. The name by which this corporation shall be known is the Hibernian Savings and Loan Association.

Art. 2. The enterprise, business, and pursuits of this corporation, and in which it shall engage, is to provide a safe and profitable place of deposit where persons dealing with the corporation may deposit their money, to be retained, loaned out, invested, and returned, together with such interest as the corporation may choose or agree to pay for the use thereof, and in the manner and according to the custom of other savings and loan institutions, and to this end this corporation shall have power to make such rules, regulations, stipulations, and agreements with its depositors and persons dealing with the corporation in its corporate capacity as may be convenient or desirable, and not in conflict

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with the laws of the state of Oregon. The corporation shall have full power to loan money on such security as may be approved by a board of directors, to be elected or appointed by the stockholders of the corporation, and do any and all things necessary or convenient to secure depositors such profits and increase upon their deposits as may be legitimate and proper for the corporation to pay, and in carrying out the true objects and interests of these articles of incorporation, and for the successful accomplishment of the purposes of the corporation. This corporation shall have power and authority to purchase, lease, rent, and hold such real estate as may be necessary or convenient in the transaction of its said business. The corporation shall never have the power, privilege, or authority to make, issue, or put into circulation any bill, check, certificate, promissory note, or other paper, or the paper of any bank, company, or person to circulate as money.

Art. 3. The principal office and place of business of this corporation shall be at Portland, in the county of Multnomah, and state of Oregon.

Art. 4. The amount of the capital stock of this corporation shall be one hundred thousand dollars.

Art. 5. The amount of each share of such capital stock shall be one hundred dollars.

Art. 6. The duration of this corporation shall be perpetual.

The following facts were agreed upon by the parties:

1. That defendant is a private incorporation, duly incorporated under and by virtue of the general laws of the state of Oregon, on the fifteenth day of November, 1879, having its principal office and place of business at Portland, Multnomah county, state of Oregon.

2. That "Exhibit A" of defendant's answer is a true copy of defendant's articles of incorporation.

3. That defendant is exercising no other powers, privileges, or franchises than those set out in article 2 of said articles of incorporation.

4. That defendant had elected a board of directors, and in every manner complied with the statute, in order to vest in them whatever powers they may legally exercise.

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5. That defendant is now receiving deposits from persons choosing to deposit their money with defendant, and is paying interest to said depositors on said deposits, and is loaning such deposits for the benefit of said depositors and of the corporation, and has an office in said city of Portland for the transaction of said business."

Dolph, Bronaugh, Dolph & Simon, and Stott & Gearin, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for respondent.

By the Court, KELLY, C. J.:

The question presented for our consideration involves the construction of section 1, article 2, of the constitution, which is as follows: "The legislative assembly shall not have the power to establish or incorporate any bank, or banking company, or moneyed institution whatever; nor shall any bank, company, or institution exist in the state with the privilege of making, issuing, or putting into circulation any bill, check, certificate, promissory note, or other paper, or the paper of any bank, company, or person, to circulate as money."

It is claimed by the respondent that the first clause of this section prohibits the legislative assembly from incorporating or from authorizing the incorporation of any bank or moneyed institution whatever; and that under the second clause, all banks, companies, and institutions are forbidden to exist in the state, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory note, etc., to circulate as money. In other words, it is claimed that this section of the constitution contains two distinct propositions, independent of each other. That, we hold, is not the proper construction to be placed upon it, nor was it so intended by the convention which framed the constitution. As a matter of history, it is well known that during the whole time of the territorial government, the currency consisted of gold and silver only; and that bank notes were unknown, and never circulated among the

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people as money. The precious metals were then in great abundance here, and in the adjoining state of California. They were the production of our own coast, and the great source of its wealth, and very naturally the people of Oregon preferred that kind of money which then commanded the attention of the civilized world. They, moreover, as naturally distrusted paper money, with which they were then unacquainted, and to which they were unaccustomed. Many of the members of the constitutional convention, too, were not unfamiliar with banking operations, in the states where they lived before coming to Oregon. They had known or heard of repeated failures of banks to redeem the notes which they had put in circulation, and the losses and consequent suffering which those failures had caused to the communities where the banks existed. And it was to prevent a recurrence of these remembered evils that the clause in question was inserted in the constitution. The convention did not intend to exclude banks and moneyed institutions from the state, but to prohibit them from issuing bank notes to circulate as money. It is hardly to be supposed that the members of that body did not know that banks of deposit and discount, and banks of exchange, were necessary to properly transact business in every commercial state; or that they were ignorant of the benefits which savings banks, properly managed and conducted, are to every civilized community. In order to arrive at a correct understanding of what the convention intended by placing that section in the constitution, we have examined its journal and proceedings, and they only tend to confirm the opinions before expressed.

As originally reported by the committee on corporations and internal improvements, the first section of article 11 reads as follows:

“Sec. 1. The general assembly shall not have the power to establish or incorporate any bank or banking company or moneyed institution whatever, with the privilege of making, issuing, or putting in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the

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paper of any bank, company, or person, to circulate as money."

In the debate which took place upon this section, it was supposed that as it was reported by the committee on corporations and internal improvements, the section would not prohibit corporations organized in other states from coming to Oregon and establishing branch offices and putting paper money in circulation. To prevent this, Mr. Williams offered the following amendment: Insert in sec. 1, second line, after "*whatever*," "*nor shall any bank, company, or institution exist in this state*," which amendment was adopted. Excepting striking out the word *general* and inserting the word *legislative*, this was the only amendment made to the committee's report. And all that was intended by the convention in adopting the amendment was to place corporations from other states under the same restrictions as those incorporated in this state. All alike were to be prohibited from making, issuing, or putting bank notes in circulation as money.

Excepting that the amendments adopted by the convention are not italicized, the engrossed copy of article 1, sec. 11, is as follows:

"Section 1. The legislative assembly shall not have the power to establish or incorporate any bank or banking company or moneyed institution *whatever, nor shall any bank, company, or institution exist in the state* with the privilege of making, issuing, or putting in circulation any bill, check, certificate, promissory note, or other paper, of any bank, company, or person to circulate as money."

The section, as engrossed, is without any punctuation whatever. We are, therefore, well satisfied that the convention did not intend to separate that part of the section which preceded the amendment from the context which followed the amendment. It follows from this that the semicolon, placed immediately after the word "*whatever*" in the printed constitution, was a clerical mistake, and that it was not entitled to have the force and effect claimed for it by the respondent.

Another thing we must take into consideration in the con-

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struction of this section. If it be construed as contended for by the respondents, then it presents this singular anomaly, that banking privileges have been extended to the citizens of other states and the subjects of foreign nations, which have been denied to our own people. They are permitted to establish banking corporations in Oregon, having all the rights and privileges usually exercised by banks, excepting only those of making and issuing bank bills and notes to circulate as money. If conceded to them, why should these privileges be withheld from citizens of this state? Such, we again say, was not the intention of the framers of the constitution.

The judgment of the court below is reversed, and judgment will be entered in favor of the appellant on the statement of facts agreed upon by the parties.

JOHN W. JACKSON, APPELLANT, *v.* LAURA JACKSON,
RESPONDENT.

CUSTODY OF MINOR CHILD, UNDER DECREE OF DIVORCE.—In a suit to dissolve the marriage contract by a husband against his wife, where the court granted a divorce on account of the adultery of the wife, and also decreed that the custody of an only child of the parties, a boy between three and four years of age, should be given to its maternal grandfather, with whom the divorced wife resided, *held*, that this was erroneous, and that the father of the child, having the means to provide for its maintenance and support, and being otherwise a proper person to care for it, and being the party not in fault in the divorce suit, was entitled to the care and custody of the child in preference to its grandfather.

APPEAL from Clackamas County.

This is a suit by the appellant to obtain a divorce from his wife on account of adultery committed by her, and for the custody of Gilbert Roy Jackson, the minor son of the parties, four years of age. The circuit court granted the divorce, but awarded the care and custody of the child to Harrison Ogle, its maternal grandfather, with whom the respondent was living before and since the trial. From this part of the decree the appeal is taken.

Opinion of the Court—Kelly, C. J.

Septimus Huelat, for appellant.

Johnson & McCown, for respondent.

By the Court, KELLY, C. J.:

By the common law, a father has the paramount right to the care and custody of his minor children, unless it be shown that he is a man of grossly immoral principles or habits, or that he has not the ability to provide for them, or that they have been ill-used by him. (*People ex rel. Nickerson*, 19 Wend. 16; *People ex rel. Olmstead v. Olmstead*, 27 Barb. 9.) The statutes of this state somewhat modify the doctrines of the common law, and whenever a marriage is declared to be dissolved, the court has power to decree as follows: "For the future care and custody of the minor children of the marriage as it may deem just and proper, having due regard to the age and sex of such children, and unless manifestly improper, giving the preference to the party not in fault. (Civ. Code, sec. 497, subd. 1, p. 211.)

It becomes necessary, therefore, to examine the evidence in the case in order to ascertain the character, standing, and fitness of the parties, and their ability respectively to provide for the future maintenance and education of the child. It appears by the testimony of many respectable witnesses, who have known the appellant nearly all his life, that he has ever maintained the character of an honest, industrious, and sober man, and was a kind husband and father to his wife and child while they lived with him. It further appears that by his industry and economy he had accumulated considerable property as a farmer and stock raiser, valued at four thousand or five thousand dollars, and that he is quite able and willing to support and educate his child.

On the other side, it appears from the evidence on file in the case, that the respondent, without any cause, deserted her husband in Grant county under the pretense of going to her parents' residence in Clackamas county. That instead of going there, she went off with her paramour to British Columbia, and lived with him, passing as his wife under an assumed name. That she was afterwards a wit-

Opinion of the Court—Kelly, C. J.

ness in her own behalf on the proceedings to obtain a divorce, when she denied under oath that she was guilty of any act of adultery, which we are constrained to say was far from the truth, if many other respectable witnesses are to be believed. It further appears that the respondent is now living with her father, and that she has no property of any considerable value, with which she can support herself and her child.

The statute before referred to, requires the court, in cases of divorce, to give the care and custody of minor children to the party not in fault, unless otherwise manifestly improper. And observing this rule laid down to govern the courts, we think the child in this case should be placed under its father's care. It is now within a few days of four years of age. Its father is an industrious, sober, and competent person to take charge of it, and has the means to provide for its education and welfare. He was not the party in fault in the divorce proceedings, and we know of no manifest impropriety in giving the care and custody of the child to him. On the other hand, its mother has not shown that she possesses a good moral character, so far as chastity and truth are concerned, and she has not the means to provide for and educate the child, and she was the party in fault in the divorce case. It is true the decree of the court was not to give the care and custody of the child to the respondent, but to her father. This, however, is virtually placing it under her control, as she also resides with him. As between the father and grandfather of a child, the former certainly has the better right to its care and custody, unless he is manifestly an improper person to take charge of it, which does not appear to be so in this case.

The decree of the circuit court is, therefore, reversed, so far as the same relates to the custody of the child. And it is ordered that the appellant, John W. Jackson, shall have the care and custody of the said minor child, Gilbert Roy Jackson, until the further order of the circuit court for Clackamas county.

Statement of Facts.

R. WILLIAMS, APPELLANT, v. H. ACKERMAN, RESPONDENT.

8	405
18	180
22*	600

PAROL LEASE FOR MORE THAN ONE YEAR.—Where A. leases of W. a store under a verbal lease for three years, and enters into possession and pays rent, such tenancy becomes a tenancy from year to year, and can only be determined by notice from one party to the other.

APPEAL from Multnomah County.

The respondent (Ackerman) occupied the north half of lot number two in block number one, Portland, under a parol lease from appellant Williams, for the term of three years. The original lease was made December 1, 1876, with the firm of Ackerman & Co. Respondent was the successor of the said firm, occupying the premises under the same lease from January 1, 1877. A written lease had been prepared and presented to and retained by the lessees, but never executed, though they took possession by virtue thereof. Respondent so occupied said premises until February 6, 1878, with the consent of appellant, and paid appellant the rent up to that time. On that day respondent abandoned the premises and sent the key to appellant, who refused to receive it, and it remained in possession of respondent until the twenty-second day of March, 1878, when appellant proposed to receive the premises from that day, and the respondent, without remark, delivered the key to appellant. The monthly rental was one hundred dollars. No notice, either verbal or written, had been given by either party to the other. The action was commenced by appellant in the county court for the rent accruing from February 6 to March 22, in which court the appellant recovered judgment for the sum of one hundred and fifty-eight dollars and thirty-three cents.

The respondent appealed from this judgment to the circuit court. The latter court, the judge having heard the case upon a written stipulation and without the intervention of a jury, found for respondent. From that decision this appeal is taken.

Points decided.

Claude Thayer, for appellant.

Whalley & Fechheimer, H. Ach, and James Gleason, for respondent.

By the Court, Boise, J.:

From this statement of facts it appears that Ackerman & Co. entered the premises in question under a parol agreement to lease the same for three years, and being so in possession delivered the possession to the defendant, who became their successor under the same right. We think that under the authority of *Garrel v. Clark*, this became a tenancy from year to year, and could only be determined by notice by one party to the other. The rule is fully stated in that case, and we feel constrained to adhere to it as settling an important principle concerning such tenures, and we are not at liberty to change this rule at this time, unless we should find very cogent reasons for so doing, and we think no such reasons exist. We therefore refer to the opinion of Judge Shattuck, in that case, for a full statement of the reasons on which the rule was established. (5 Or. 64.)

The judgment of the circuit court will be reversed and judgment given for the plaintiff on this agreed statement of facts.

8	406
11	411
5*	54

8	406
25	24
34*	696

8	406
88	163

8	406
48	571

J. F. HENDRIX, RESPONDENT, *v.* HENRIETTA B. GORE, JAMES GORE, AND PHILIP GRIGGSBY, APPELLANTS.

A MORTGAGE TO SECURE FUTURE ADVANCES IS VALID.—A note and mortgage given for a greater sum than is due by the mortgagor, to secure both a present indebtedness and future advances, is valid to secure the amount due at its date as well as future advances actually made in pursuance of a parol agreement entered into when it was given, although the mortgage does not set forth the real character of the transaction.

ITEM—PLEADING, WHAT ALLEGATION OF PAYMENT SUFFICIENT.—Where a defendant, in his answer, in a suit to foreclose a mortgage, alleged that he had fully paid it, he was entitled to prove on the trial that the plaintiff received money at different times, to be applied as payment on the mortgage, although he had not pleaded such payments as a counter-claim.

Opinion of the Court—Kelly, C. J.

ITEM—PAYMENTS ON MORTGAGE NEED NOT BE PLEADED ON FORECLOSURE—

A payment of money made on account of a mortgage, is not a cause of suit, which must be pleaded by the defendant as a counter-claim to entitle him to prove such payment in a suit to foreclose the mortgage.

APPEAL from Linn County. The facts are stated in the opinion.

Humphrey & Hewitt, Bonham & Ramsey, for appellants.

E. N. Tandy, John Burnett, R. S. Strahan, for respondent.

By the Court, KELLY, C. J.:

In the early part of 1871, the appellants, who are husband and wife, erected a building for a hotel on two lots owned by the appellant, Henrietta B. Gore. In building and furnishing it they contracted debts with different persons, which they were unable to pay. Among these was one to Driggs and Carter, for two hundred and sixty-one dollars, for lumber and material used in the construction of the house, and another to one Farrier, for about one hundred dollars, for furniture put into it. Needing more money to furnish it, the appellants borrowed three hundred dollars from the respondent about June 27, 1871, and on that day gave their promissory note to him for one thousand dollars, payable one year after date, and to secure its payment, on the same day executed a mortgage on the lots and house belonging to the wife. It is admitted by the respondent, that at the time appellants gave the note, they did not owe him a greater amount than three hundred and ninety-seven dollars and ninety-five cents, including the money loaned by him. But he alleges that the note and mortgage were given to secure not only this debt, but also other sums of money then owing by the appellants, and which the respondent then assumed to pay, particularly the amounts which they owed to Driggs and Carter, and to Farrier. Respondent further alleges that at the time the note was given, it was the understanding of the parties that whenever the amount then due to respondent and all future advances, and interest thereon at the rate of one per cent. a month,

Opinion of the Court—Kelly, C. J.

should be fully paid, then the note was to be delivered to appellants, and the mortgage was to be satisfied.

On the other hand, it is contended by the appellants that the note and mortgage were given to secure the payment of the three hundred dollars then loaned by the respondent, and for the further purpose of keeping off their creditors until such time as they could pay them. We think the evidence tends more strongly to support the position contended for by the respondent. The fact that after two payments, amounting to two hundred and ninety dollars, had been made on the note, it was agreed by the parties that the rents due by Hendrix and Baker, on the lease executed on the twenty-sixth of January, 1876, for two years, were to be applied to the payment of the note and mortgage, as testified to by R. F. Baker, a disinterested witness, shows that the amount was for more than three hundred dollars. Moreover, it will not be presumed by the court that the note and mortgage were given for the unlawful purpose of delaying creditors of the appellants in collecting their demands. We think, therefore, that the weight of testimony substantially establishes the fact that the note and mortgage were given by the appellants, not only to secure the payment of the demands then owing to the respondent, but also to secure future advances to be made by him to pay off certain debts then due by them to other creditors.

But the appellants contend that inasmuch as there is no reference in the mortgage to any future advances, to be made by the respondent, no payments made by him to such creditors can be tacked to or included in such mortgage, and in support of this position, we are referred to the cases of *Divver v. McLaughlin* (2 Wend. 596), and *Walker v. Snediker* (1 Hoffman Ch. 144). The vice-chancellor, commenting on these decisions, in the case of *Craig v. Tappan* (2 Sandf. Ch. 596), says of the case in 2 Wend. 596, "that the absence of a statement in the mortgage that it was also to secure future advances, was commented upon by the chief justice with many other circumstances, but he does not say that this omission is of itself essential; and there were other abundant evidences of fraud in that case

Opinion of the Court—Kelly, C. J.

upon which to base the decision." In the case cited from 1 Hoff. Ch. 144, the assistant vice-chancellor says: "But the better opinion, if not the decided law, is, that the mortgage must express the object. It is certain that it can not be rendered available for future liabilities by a subsequent parol agreement." It will be perceived that he was referring to a parol agreement for future advances, made after, and not at the same time with the mortgage, as in the case now under consideration. After the decisions which have been referred to by the appellants' counsel were made, the authorities were all reviewed by the vice-chancellor in the case of *Craig v. Tappan*, 2 Sandf. Ch. 85, where he held "that a mortgage intended to secure future advances, need not express that object in the mortgage itself, but when it is not stated the mortgage will be liable to suspicion, and the holder put upon stricter proof of the payment of the consideration; but its omission will not render the security invalid." The same principle was afterwards declared by the supreme court of Illinois, in *Collins v. Carlisle*, 13 Ill. 254, and still later by the supreme court of California in *Tully v. Harloe*, 35 Cal. 302.

The true principle to be deduced from all these cases seems to be, that where a mortgage is given in good faith to secure a present indebtedness and future advances, whether the object be expressed in the mortgage or not, it is valid to the extent of the lien therein expressly created. It is always better, however, that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is engendered by misrepresentation, but disarmed by a statement of the truth. (*Shiras v. Caig*, 7 Cranch, 34.) The appellants must therefore be held liable on the note and mortgage, for the amount which they actually owed to the respondent when the mortgage was given, and also for the amount paid by him to Driggs and Carter; and such other small sums as he agreed to and actually did pay for the appellants, together with interest thereon since the time of payment. The rate of interest which was to be paid on these several sums is a matter of dispute between the parties, and as it is not specified in the

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note or mortgage, only the legal rate of interest will be allowed.

The respondent claims a credit for one hundred and twelve dollars and eighty-two cents, being a debt due by appellants to Wm. Farrier, which respondent assumed to pay. It appears that the promise to pay was not in writing, and an agreement to answer for the debt, default, or miscarriage of another, unless in writing, is void. It would, moreover, be unjust to allow him credit for an amount which he promised to pay, but which promise he failed to fulfill, and that, too, while James Gore is still liable for the same debt. This claim will be disallowed, except the small sums paid thereon by the respondent. So, also, the claim of seventy-five dollars, balance due on the wagon and harness, will be disallowed, because it does not appear that it was a debt secured by the mortgage. The appellants in their answer deny that there is anything due on the mortgage, and allege that it has been fully paid. They now claim, that in addition to the two payments of two hundred and forty dollars and fifty dollars, admitted by the respondent, they should also be allowed a credit for the rents due on a certain lease of the mortgaged premises to Hendrix and Baker, made on the twenty-sixth day of January, 1876. It appears from the evidence of R. F. Baker, one of the lessees, that it was the agreement and understanding of the parties to the lease that the rents, as they became due, at the end of each month, were to be applied to the payment and discharge of the mortgage debt, and that he paid his share of the rent to the respondent accordingly. But it is objected by the respondent that the amount due for rent on the lease should not be considered or allowed, because it is not between the same parties, and there is no counter claim pleaded in either answer. We think the appellants are entitled to a credit for the rents paid by Hendrix and Baker, the lessees to the respondent, and which he received according to the understanding and agreement of the parties to the lease, to be applied as payments on the mortgage debt. That it was agreed that the rents should be so applied, is clearly proven by R. F. Baker, and is not denied by the respondent. And the objection

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that these monthly rents so received by the respondent from the lessees should not be allowed as credits in favor of the appellants because they have not been pleaded as a counter claim, is untenable. A payment made on a note or other evidence of indebtedness is not a cause of action or of suit which may be pleaded as a counter claim. It is rather the extinguishment of a cause of action or suit by the adverse party, to the extent of the payment so made; and evidence of such payment may be offered on the trial under the general allegation, that the demand of such adverse party has been paid. We therefore hold that the appellants are entitled to a credit for the rents of the mortgaged premises under the lease of the twenty-sixth of January, 1876, "less the cost of the improvements made thereon which were a permanent part of the house, and actually necessary for the convenience, profit, and protection of the premises," as specified in the lease. The rents received by the respondent from the twenty-first of February, 1876, to the twenty-first of February, 1878, amounted to six hundred dollars, from which should be deducted two hundred and twenty-nine dollars and fifty-six cents for permanent improvements on the mortgaged premises; one hundred and eleven dollars and fifty cents for insurance paid by the lessees, and thirty-three dollars for rent paid to appellant, James Gore; in all, three hundred and seventy-four dollars and sixteen cents, leaving two hundred and twenty-five dollars and ninety-four cents, and interest thereon to be applied in part payment of the mortgage.

A statement of the accounts between the parties in accordance with the views herein expressed, is annexed to this opinion, by which it appears that there is now due upon the mortgage the sum of four hundred and eighty-nine dollars and twenty-four cents, and a decree will be entered accordingly for that sum.

[The statement of accounts referred to in the opinion is not necessary to an understanding of the points decided. It is therefore omitted.—REPORTER.]

Statement of Facts.

**GEORGE ALLEN, APPELLANT, v. EDWARD HIRSCH,
STATE TREASURER, RESPONDENT.**

8 412
11 498
11 499
20 501
20 506
5* 746
26* 806
26* 806

CONSTITUTIONAL ACT—WAGON ROAD ACT NOT LOCAL OR SPECIAL.—The acts entitled "An Act to provide for the construction of a road in Grant and Baker counties, to be known as the Eastern Oregon and Winnemucca Road," approved October 19, 1872, and "An Act to provide for the construction of a wagon road up the south bank of the Columbia river from near the mouth of Sandy, in Multnomah county, to the Dalles in Wasco county," approved October 23, 1872, are not in conflict with article 4, sec. 23, subd. 7, of the constitution, which declares that "the legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say, * * * for laying, opening, and working on highways, and for the election or appointment of supervisors." The said acts of the legislative assembly are public laws, and not special or local laws, within the meaning of that clause in the constitution.

APPEAL from Marion County.

The case is mandamus to compel the payment of certain warrants drawn by the secretary of state upon the state treasury. The appellant filed in the circuit court his petition for a writ of mandamus, in which he referred to the acts of the legislative assembly of October 23, 1872, and October 21, 1876, providing for the issuing of warrants on account of the road commonly known as "The Dalles and Sandy Wagon Road, and to the act of October 19, 1872, providing for issuing warrants on account of the "Eastern Oregon and Winnemucca Road;" and recites so much of each of said acts as relates to the appropriation of moneys to meet the warrants, the funds out of which such warrants should be payable, and the proceedings necessary to authorize the secretary of state to draw the warrants. The petition then states particularly and at length such facts as show that on the twenty-fourth day of May, 1875, a warrant was drawn in accordance with the provisions of said act of October 23, 1872, by the secretary of state, for one thousand dollars, payable to the order of the chairman of the board of commissioners created by said last named act, out of the funds applicable thereto under said act; that on said twenty-fourth day of May, 1875, said warrant was presented to the state treasurer for payment, but was not paid for want of

Statement of Facts.

funds in the hands of the treasurer applicable thereto; that since that time, and prior to the twenty-seventh day of August, 1879, the said warrant had been indorsed by the said chairman of the board of commissioners, and the petitioner had become the holder thereof; that before said twenty-seventh day of August, 1879, sufficient moneys belonging to said funds had been received into the state treasury to pay said warrant; and that on that day the petitioner presented said warrant to the defendant, who then was and still is state treasurer, and demanded payment thereof, but payment was refused. This is the first count of the petition.

The petition then proceeds, with the same particularity, to set forth the drawing of a warrant by the secretary of state, on the thirteenth day of September, 1877, in accordance with said act of October 21, 1876, for one thousand dollars; the presentation of that warrant to the state treasurer on the day it was drawn; its non-payment for want of applicable funds; the subsequent transfer of the warrant to the petitioner; the receipt into the treasury of funds sufficient to pay it; the presentation and demand of payment on the twenty-seventh day of August, 1879; and the refusal of defendant, as treasurer, to pay it.

In the same manner the petition states the drawing of a warrant, by the secretary of state, on the fifteenth day of May, 1873, upon the treasury, in accordance with the said act of October 19, 1872, for one thousand nine hundred and ninety-six dollars; its presentation to the treasurer on the day it was drawn, and its non-payment for want of applicable funds; its subsequent transfer to the petitioner; that there was on the thirty-first day of October, 1879, sufficient funds in the treasury applicable to its payment; and that on that day it was presented by petitioner to the defendant as treasurer, and payment was demanded and refused.

Upon these allegations the petitioner prayed writ of mandamus to compel the defendant, as treasurer, to pay said several warrants, and the accrued interest thereon. The alternative writ was issued, commanding the defendant to pay the warrants, or show cause why he had not done so. On the return day, the defendant demurred to the petition,

Argument for Appellant.

on the ground of insufficiency; and the circuit judge, without argument, and upon the understanding that the case was to go to the supreme court to test the constitutionality of the several acts of the legislative assembly, under which the warrants were drawn, made a *pro forma* decision sustaining the demurrer and dismissing the cause at petitioner's cost. The petitioner appeals to this court.

W. Lair Hill, for appellant:

Subdivision 7 of section 23 of article 4 of the constitution of the state provides as follows: "The legislative assembly shall not pass special or local laws in any of the following enumerated cases, viz: * * * For laying, opening, and working on highways, and for the election or appointment of supervisors." It is contended that the several acts referred to in the petition are special or local laws, and by reason of their subject-matter are prohibited by the constitutional provision just quoted; and that therefore the warrants drawn under those acts are void. On the surface of the case it is seen, that in order to reach a decision as to the right of the petitioner to the relief demanded, the court must consider and pass upon the questions:

1. Are the acts in question special or local laws within the meaning of the constitution?
2. If these acts are special or local laws, are the warrants drawn in pursuance of them void?

Are the acts in question special or local laws within the meaning of the constitution? This is primarily a question of definitions. It must first be ascertained what is a special or local law; in other words, what are the definitions of the terms special and local, as used in the constitution; and then it must be determined by examination of the acts in question, whether they fall within either of these definitions. It will hardly be contended that these acts fall within the definition of local laws, as there can hardly be any difference of opinion among lawyers upon that subject. If, however, it should be contended on the part of the respondent, that they are local laws, the error of that position will be per-

Argument for Appellant.

ceived upon a moment's consideration of the matter. A local law is a law which affects only the inhabitants of a particular district. It is operative generally within certain geographical boundaries, but inoperative outside of those boundaries. It is general in character, but local in its application. (1 Bl. Com. 74; Bouv. Dict., *in verb.* "Custom;" *People v. Supervisors of Chautauqua*, 43 N. Y. 10.) Neither of the three acts under which these warrants were drawn comes within this definition. In *People v. Supervisors*, just cited, the fact that the money to be raised was to be used in paying for a local public work, was held not to make the law local, and that is the only feature of the acts now under examination which even suggests the idea of their being local laws.

Are these acts special laws within the meaning of the constitution? The answer to this question depends on the question, What is a special law, as the term is employed in the constitution? And unless, by the constitution itself, or by the historical circumstances under which it was adopted, it is apparent that the word special, as applied to a law, was intended by the framers of that instrument to have a meaning different from its technical or common law meaning, that technical or common law definition must be taken as the true meaning in the constitution. This is a settled canon of constitutional interpretation. (Cooley on Const. Lim. 59-61.) Applying this rule of interpretation, what is meant by "special law" in the constitution? It had, and still has, a well-known common law meaning. When applied to statutes, the word special is a technical word, and is synonymous with "private," which was formerly the more frequent term. A special or private statute is a statute which affects only certain specified individuals or private concerns. It is the opposite of a public or general law, which applies to all persons who may happen to be so situated as to fall within the general purview of operation. (1 Bl. Com. 85; Bouv. Dict., *in verb.* "Statute;" *Calking v. Baldwin*, 4 Wend. 668.) Examine the acts in question, bearing in mind this common law definition of a special law. The act of October 23, 1872, condensed into

Argument for Appellant.

a few words, was simply this: It created a commission to survey, and lay out, and construct a public road from the Sandy river, in Multnomah county, to Dalles City, in Wasco county; appropriated for the construction of the road, fifty thousand dollars out of the funds arising from the five per centum of the sales of public lands, and out of the funds arising from the sale of swamp and overflowed lands; and prescribed in detail the duties of the commissioners in carrying on the work. That is the act under which the first of the warrants described in the petition was drawn.

The act of October 21, 1876, under which was drawn the second of the warrants described in the petition, is merely an act changing, in some respects, the plan of carrying forward the work provided for by the former act, and making a further appropriation for that purpose. The act of October 19, 1872, under which was drawn the third of the warrants described in the petition, is in all respects, so far as concerns the question of whether it is a general or a special law, exactly similar to that of October 23, 1872. Neither of these confers any rights or privileges upon particular individuals. They are acts for a public purpose, namely, the making of certain public internal improvements. Their object is to promote and facilitate public travel and transportation, and their method is that which is necessarily adopted in the execution of all public works, that is, by the employment of public agents. They in no wise differ in this respect from the acts creating commissions to build the state house, to protect the rights of the state and people in the canal at Oregon City—to perform services in connection with any public improvement. Whatever may be the title conferred on the agent by the statute, the principle on which his relations to the public are to be determined is always the same. Such laws, it is plain, do not answer the common law description of special or private statutes. This proposition, so plain to reason, is equally supported by authority. (*Culking v. Baldwin, ubi sup.*) An almost unlimited array of decisions to the same effect might be cited, and none, it is believed, can be produced, holding the contrary.

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These acts being shown to be neither special nor local, as those terms were defined by the common law, they are not such laws as the constitutional provision was intended to prohibit, unless it appears from the constitution itself, or from its historical surroundings, that the convention by whom the constitution was framed, were induced to employ the well-known terms of law in a sense different from their well-known legal meaning. No other deliberative body that ever sat in Oregon had among its members so many distinguished lawyers, as had that convention. In its roll of membership appear the names of no less than seven who have been supreme judges, including all the judges of the supreme court at this time. It was presided over by one whose reputation as a jurist is coextensive with the nation. Another of its members has since been attorney-general of the United States. And besides these, there were many lawyers whose achievements at the bar form a part of the public history of the country. One does not readily conclude that a convention controlled by men of such character, in framing an instrument which, by its nature, would be expected to be written in the peculiar language of the law, which was to be interpreted and administered by the courts of law, and which was to control all future legislation of the state, would employ the technical terms peculiar to their art and profession, in a sense different from their technical and legal sense, and then furnish no key or clue by which their intended sense could be discovered. But highly improbable as such a conclusion would be, it must be adopted before the court can hold these acts to be either special or local within the meaning of the constitution. If the views above expressed are correct, they dispose of the case by establishing the validity of the warrants in question.

But suppose the acts under which the warrants were drawn should be held to be special laws, so far as they provide for the laying, opening, and working the roads therein specified, does it follow that the warrants are void? I submit that it does not. Under these acts the warrants were drawn and went into circulation. The state, by its agents, received the money for them and used it in the internal improvements

Argument for Appellant.

provided for in the acts. Can the state now, after having gotten and used the consideration for which the warrants were issued, repudiate the debt and protect itself in so doing by pleading that the law made by itself and through which it was enabled to obtain the money and carry on its public works, is void? Certainly in morals it is estopped to do so, and it ought to be estopped in law. It seems to me this case is analogous, in respect of the point now under consideration, to that of one arising under a contract which is void for non-compliance with mere statutory requirements in its execution. So long as the contract remains wholly executory, either contracting party may repudiate it; but when one has performed it on his part, the other, having received the benefit of it, must make him whole. It will not be disputed that if one, having received value upon a void contract, gives his note or bill for the payment, it is too late for him to question in a court the validity of the transaction.

If to this the answer be made that the principle on which the argument is founded applies only to cases of contracts which are void by reason of some defect in the mode of their formation, and not to those which are absolutely unlawful, I reply that while at first presentation there appears to be some force in the suggestion, it will not bear the test of logical scrutiny. Under the constitution, statutes may be passed providing for laying, opening, and working highways, and the defect alleged against the acts in question is not that they are upon subjects on which the legislature was prohibited from legislating, but that the legislature did not proceed in such a manner as to make the acts valid. The defect complained of is a defect of manner or mode simply, and the consequence contended for is not such as usually follows, as the penalty of violated law, but simply that the acts are invalid. So the analogy to the case suggested, a case under the statute of frauds, for example, is perfect. And by following this analogy the administration of justice is kept in the line of natural equity and good conscience, while by disregarding it, natural justice is trodden down, the state becomes a repudiator of its honestly-contracted obligations, and in the end suffers ten-fold more in the loss

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of its credit than it can possibly gain from the ill-gotten exemption from its debts.

There is another point that deserves consideration as bearing on the question of the validity of the acts authorizing the first and second warrants described in the petition. These acts provide that the warrants shall be payable out of the funds arising from the five per centum of the net proceeds of sales by congress of public lands in the state, as well as out of the funds arising from the sale of swamp and overflowed lands. In the constitution (article 8, sec. 2), provision was made for diverting this fund to the fund for public education. But congress, in the act admitting the state into the Union, submitted six propositions to the "people of Oregon," each of which, if effectual, would modify, extend, or limit the constitution in some particular. One of these propositions was, that the five per centum fund above referred to should be "paid to the said state for the purpose of making public roads and internal improvements, as the legislature shall direct." And this proposition, as well as the others, was by the same act of congress made to depend on the express condition that the people of Oregon should "provide by ordinance, irrevocable without the consent of the United States," that the state should never interfere with the primary disposal of the soil, etc. The people of Oregon, by their legislature, thereupon, formally and solemnly, accepted all the propositions and passed the required ordinance, declaring it to be irrevocable without the consent of the United States. That was the last of the series of instruments, of which the constitution was the first, by which Oregon reached her present position in the Union; and I humbly submit that the proposition above cited has the effect so far to modify the constitutional provision upon which respondent relies, as to except from its operation such acts as apply the five per centum fund to the building of public roads. The proposition is not only that the fund shall be used in accordance with the original intention of congress as expressed in the act of 1841, but that it shall be applied to that object in such manner "as the legislature may direct." If this has

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any force at all, it repeals, by unavoidable implication, the restrictions upon the legislative authority to pass special laws for the application of this fund to the construction of public roads.

Thus matters stood till 1871, when congress, by joint resolution, gave the consent of the United States for this fund to be transferred to the school fund; but in the same resolution it was expressly provided that nothing therein contained should "influence the construction" of the act, in which the six propositions were made. This proviso, I take it, makes the resolution of 1871 ineffectual until the state of Oregon shall revoke its acceptance of the proposition. The acceptance of the proposition was an enactment of its provisions, and the resolution of congress did not repeal that enactment; it merely absolved the state of Oregon from its obligation not to revoke it.

If I am correct in insisting that these acts are neither *special* nor *local* laws, it follows that all the warrants are valid. If I am wrong on this point, but right on the proposition that the state can not refuse to pay its warrants after it has received the consideration for them, it follows that all the warrants are valid. If I am wrong on both the above points, but right as to the effect of the act of congress admitting the state into the Union, and of the acceptance by the state of the propositions therein contained, it follows that the first two warrants described in the petition are valid.

Knight and Lord, for respondent:

The petition of appellant as to the first and second causes of action is fatally defective in this: There is no allegation in either of said causes that there was at the time the payment of said warrants was demanded of respondent, money in the state treasury sufficient to pay the same and applicable thereto. The allegation upon that point in the first cause of action is as follows: "Thereafter (the date of the first presentment of the warrant to the state treasurer), and prior to the twenty-seventh day of August, 1879" (the day payment was demanded of respondent), "there was received

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into the state treasury, of said funds, an amount of money sufficient to pay said warrant."

The allegation in the second cause of action is precisely the same as in the first. These allegations, we claim, are not sufficient to constitute a cause of action against the respondent, and that the demurrer was properly sustained as to those causes of action.

In the next place, we claim that the several laws under which all of the warrants mentioned in the petition were issued are special and local laws, and are, therefore, void under section 23, article 4, of the constitution of this state, which reads as follows: "The legislative assembly shall not pass special or local laws in any of the following cases," and among the enumerated cases under that section is the following: "7. For laying, opening, and working of highways, and for the election or appointment of supervisors." This section of the constitution carries with it its own interpretation; and it is too plain for argument that no road or highway can be laid out or worked in this state except under and pursuant to a general law providing for the location and construction of all roads in the state. In obedience to that provision of the constitution, the legislature has provided by general law for laying, opening, and working of all highways in this state. (Civ. Code, 721.) Each of these laws provides for the laying out and construction of a special and particular work, and they are, therefore, unconstitutional and void. It follows, therefore, as a legal consequence, that these warrants, issued under and pursuant to those laws, are also void, and their payment was rightly refused by the respondent.

By the Court, KELLY, C. J.:

The question here presented for consideration is, whether the several acts of the legislative assembly referred to in the appellant's petition authorizing the construction of the Dalles and Sandy road and the Eastern Oregon and Winnemucca wagon road are constitutional.

Article 4, section 23, subdivision 7, of the constitution is as follows: "The legislative assembly shall not pass

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special or local laws in any of the following enumerated cases; that is to say * * * 7. For laying, opening, and working on highways, and for the election or appointment of supervisors." It is claimed by the counsel for respondent, that these acts are special and local in their character, and therefore in conflict with the provision of the constitution just quoted, and the warrants drawn under and in pursuance of them are, therefore, necessarily void. Blackstone says: "Statutes are either general or special, public or private. A general or public act is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." (1 Bl. Com. 85.) The words "general" and "public" are here used as expressing the same kind of statutes. So, also, special statutes are, according to the common law definition, synonymous with private statutes. The early elementary law writers seem to have made no distinction between a private and a local statute, but define private acts to be those which related to particular persons or classes of men, or which related to a particular place or town. (Burrill's Law Dict., *voce* "Private Statute;" Bac. Abr., Statute F; 1 Kent's Com. 459.) In more recent times, another distinction has been made by the constitutions of several states of the Union, including that of Oregon, in which the terms "local act" and "local laws" are used in contradistinction to public or private acts or laws. Notably this is so in the constitution of New York, and the decisions of the court of appeals have, in a measure, construed and settled the meaning of the words "local bills" or "local acts" in that state.

In the case of *The People v. Hills*, 35 N. Y. 449, it was held that "an act to amend and consolidate the several acts relating to the city of Rochester," was a local act, within the meaning of the constitutional provision "that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." In *The People v. O'Brien*, 38 N. Y. 193, the

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question before the court was whether an act of the legislature, so far as it related to the term of office and the time for electing councilmen in the city of New York, was a general or local law. The court said: "It is clear that it relates only to the officers of the municipal corporation of New York, and has no force outside of the territory embraced in the corporation, nor any possible effect upon property not within the corporate limits, or upon persons not for the time being within such limits. It would seem to follow necessarily that the act in question is local, as contradistinguished from general. The former is entirely confined in its operations to the property and persons of a specified locality, the latter embracing either persons or property of the people of the state generally, or some class of persons or species of property."

In *The People v. Allen*, 42 N. Y. 378, the question was whether an appropriation of money to improve Bouquet river was a general or local act. It was a small stream emptying into Lake Champlain, and navigable for boats about three miles from its mouth. Of it the court says: "Its name is not found upon the general maps of the state; it is not found in any general history of the country, and its character is in no way defined in any public statute; and it is not of such notoriety as to be known generally to the people of the state; and hence the courts can take no more notice of its character and existence than of the character, location, and usefulness of the ordinary highways of the state. In this respect it is unlike the great rivers and lakes of the state, and the mountain ranges, which are matters of general history and public notoriety." The court further says: "This is unlike any of the improvements of the Hudson river. That is a river navigable for about one hundred and fifty miles, forming a necessary link in the chain of water communication between the ocean and the great lakes. It acts an important part in the commerce of the whole state, and the citizens of the state generally are interested in its navigation. An improvement made in its navigation at any point would not be mainly or materially for the benefit of the people living at or near that point, but

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would be for the benefit of the entire commerce of that great river, and of the commerce of the whole state." The statute was held by the court to be a local act, because of the insignificant character of Bouquet river, and because the improvement of it would be mainly for the benefit of the people living in the immediate locality. But the court clearly intimates that an act for the improvement of the Hudson river would not be a local but a general one, because it is the connecting link in the chain of water communication between the ocean and the inland lakes. The court of appeals, in the case of *The People v. Supervisors of Chautauqua*, 43 N. Y. 10, goes into a somewhat critical examination of the authorities defining what is a local and what a general act, but in its essential features it is substantially like the case last referred to.

The foregoing cases have been referred to, to show what are to be considered local acts or local laws. In contradistinction to these, all acts which relate to the location and construction of the public buildings of a state, to the establishment of new counties and prescribing their limits, are public acts, because in their very nature the people of the whole state have an interest in them. In the case of *The State ex rel. Cothren v. Lean*, 9 Wis. 279, the supreme court of Wisconsin say in relation to the establishment of the county seat of Iowa county: "At the county seat of each county, the state through its proper officers administers justice; all the inhabitants of the state are liable to be sued in any county and to have their rights litigated there. And we think there is much force in the reasoning of the late Chief Justice Stowe, in the Washington county seat case, where he contends that laws relating to the location of county seats are public acts; and this view is sustained by other authorities." The court in that case also says that it is undoubtedly difficult to draw an accurate line between general laws and those not general, and to establish a test that will be entirely satisfactory. But it was there held that the character of an act of the legislature, whether it be a "general" law or not, is determined by the greater or less extent to which it affects the people, rather than by the ex-

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tent of territory over which it operates, and that a law operating in a single county, but affecting the rights of all the people therein, is a general law. In the case of *New Portland v. New Vineyard*, 4 Shep. 69, it was held by the supreme court of Maine that an act annexing one town to another was a public act. The court says: "Those are to be regarded as public acts which regulate the general interests of the state, or any of its divisions."

In the case of *West v. Blake*, 4 Blackf. 236, the supreme court of Indiana says "that an act authorizing an agent of the state to lay off and sell lots in a particular town, it being the seat of government, was a public act." And in reasoning upon the question it says: "Statutes incorporating counties, fixing their boundaries, establishing courthouses, canals, turnpikes, railroads, etc., for public uses, all operate upon local subjects. They are not, however, for that reason special or private acts." Other cases might be adduced to mark the distinction between public and special or local laws. The general principle to be deduced from all the authorities seems to be this, that whenever an act of the legislature authorizes any public road or other internal improvement to be made or other act to be done, which in its nature is more beneficial to the community at large than to the inhabitants in the immediate locality of the road, or other internal improvement, such act is to be considered a public and not a special or local law.

During the ten years of territorial government in Oregon, it was the constant practice of the legislative assembly to pass special laws to lay out territorial roads from one point to another, sometimes in the same county, but more frequently in two or more counties of the territory. Generally they were passed through the influence of interested parties, who were often named in the act as commissioners to locate the road, and the expenses of such location were imposed on the counties in which the roads were established. And then by the act of January 27, 1854 (Statutes of Oregon, 1854), the expense of opening and working them was imposed on the several road districts through which they passed. These burdens thus imposed on the people of special local-

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ties were considered as onerous, and the whole system of laying, opening, and working territorial roads came to be regarded as an exceedingly vicious mode of legislation, which interfered with the regular road system of the territory. And it was to destroy and prevent that kind of legislation that the inhibition referred to was inserted in the constitution.

Referring to the Dalles and Sandy road, now partially constructed under these acts of the legislative assembly: It is well known to all that during the winter months it is the only practicable route for a public road through the mountain range which separates eastern from western Oregon, and it was deemed to be of the most importance to the people of the state that trade and travel and mail facilities should not be obstructed; that intercourse between these two great divisions of the state should not be suspended during that season of the year when navigation on the Columbia is generally closed by ice in the river. It was well known to the legislative assembly that, for weeks at a time, all communication between the east and west was suspended, until the interruption came to be regarded as almost a public calamity, and it was to prevent these obstructions that the appropriations of money were made to construct the Dalles and Sandy road. It is in no sense a local road. The advantages to the inhabitants living along the route or line of the road are insignificant when compared with what will be the benefits to the people at large, or at least to those residing in the two great sections before referred to, whenever the road shall be completed.

The reasons given to show that the acts making appropriations to aid in the construction of the Dalles and Sandy road are not special or local laws, will equally apply to the act authorizing the construction of the eastern Oregon and Winnemucca wagon road.

It may be noted here that the moneys appropriated by these acts are not derived from taxes levied on the people of the state. The five per centum of the net proceeds of the sales of the public lands are paid by the United States to this state expressly for the purpose of making public roads and

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internal improvements, and can be applied to no other purpose without a violation of the trust upon which they are received. The swamp and overflowed lands also were granted to the state for the purpose of paying the expenses of reclaiming them. And the fund in the treasury arising from the sale of these lands is the excess of the purchase money, over and above the expenses of the reclamation, which expenses the purchasers have either paid or are under obligation to pay hereafter.

There is another reason why the acts of the legislative assembly, referred to in the petition, are to be regarded as general laws, and not special or local acts. Article 4, section 27, of the constitution, declares that "every statute shall be considered a public law, unless otherwise declared in the statute itself." Neither of the acts contains such a declaration.

We hold, therefore, that they do not come within the constitutional inhibition contained in section 23 of article 4, that "the legislative assembly shall not pass special or local laws * * * for the purpose of laying, opening, and working on highways." We think the objection to the sufficiency of the first and second clauses of the petition is well taken by the counsel for respondent. In neither of them is there any allegation that when payment was demanded on the twenty-seventh day of August, 1879, there was sufficient money in the treasury to pay said warrants and applicable to such payment. The third clause in the petition is not open to this objection, and a peremptory writ of mandamus ought to be allowed, commanding the respondent to pay the warrant for one thousand nine hundred and ninety-six dollars, unless he shall ask leave to file an answer and defend upon the merits.

It is ordered that the judgment be reversed, and this cause remanded to the court below for further proceedings. And it is further ordered that the costs of this proceeding be paid by the state.

BOISE, J., dissents from this opinion, on the ground that the laws providing for these warrants are special laws within

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the meaning of section 23, subdivision 7, article 4, of the constitution. Section 27 of said article does not abridge the force of section 23, for the reason that a special law may be also a public law, and the provisions of these different sections are not repugnant to each other. Smith on Construction defines a special law as distinguished from a general law. Of the latter he says: "It is one which provides for all things of a kind or genus; special provides for a species of the genus." In this case a general law relating to highways should provide for all the highways of the state; a special law to a particular highway, as in this case.

8 428
45 190**APPOLLONIA PHILLIPPI, RESPONDENT, v. ANANIAS THOMPSON, APPELLANT.**

EJECTMENT—TITLE MUST BE PLEADED.—In an action of ejectment, where the defendant merely traverses the allegations in the complaint, and does not set up title in himself or another, the defendant will be confined in his testimony to such facts only as tend to show the weakness of the plaintiff's title.

ITEM—EVIDENCE.—Where the plaintiff in his evidence produces a confirmatory deed to establish his title, in which is recited other deeds by their dates, through which plaintiff derives title, it is competent for defendant to offer in evidence and produce these deeds recited to show the boundaries of the land claimed by the plaintiff.

COLOR OF TITLE—PRESUMPTION.—A party entering land under color of title is presumed to enter and occupy according to his title.

APPEAL from Multnomah County.

This is an action of ejectment. The respondent alleges that she is the owner and is entitled to the possession of the premises described, and prays for their possession. The appellant denies the allegations of the complaint. The jury returned a verdict in the respondent's favor for a part of the premises described. The respondent had judgment upon this verdict, and the appellant appeals.

On the trial, the respondent offered in evidence the United States patent to the Couch claim, which assigns the south half of the claim to Caroline Couch. It was also shown that the property in controversy is included in the

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south half of said claim. She also introduced in evidence a confirmatory deed from the widow and heirs-at-law of Couch to her, dated November 12, 1872, conveying lots 6 and 7 in fractional block 30, Couch's addition. She further offered in evidence testimony showing that she and her husband, from whom she derives title, had, since the year 1858, claimed possession, and had been in actual possession of all that portion of said lots 6 and 7 that lies north of an old fence, which was constructed by one Ebinger, prior to 1858. The appellant then moved for a nonsuit, which motion was denied.

The appellant then offered to introduce in evidence certain deeds, for the purpose of showing that the respondent held the land in dispute under a paper title, in which the same was described by definite boundaries, the introduction of which was disallowed. He also offered to introduce in evidence certain deeds to himself and to persons from whom he derives title, for the purpose of showing the boundary line between the lands of himself and the respondent, the introduction of which was allowed by the court. The appellant asked that the following instructions be given to the jury: "That if the possession of the land in dispute was originally taken under a paper title, then the presumption of law is, that they hold according to the description in their deeds; this presumption will prevail until it is overcome by proof of a change in manner of holding;" which instruction the court refused to give, upon the ground that there was no testimony on that point.

The errors assigned are as follows: 1. The court erred in admitting the confirmatory deed from the widow and heirs-at-law of John H. Couch to the plaintiff, for lots Nos. 6 and 7 in fractional block No. 30, Couch's addition, etc., and dated November 12, 1872, Exhibit "A" of the bill of exceptions; 2. In not allowing defendant's motion for a nonsuit; 3. In not admitting the deeds offered by defendant to prove that plaintiff held the land in dispute under a paper title, in which the land was described with certain specified boundaries; 4. In not admitting in evidence the deeds offered by defendant, for the purpose of showing the true

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boundary line between the lands of plaintiff and defendant; 5. In not giving to the jury the instruction presented by defendant, and fully set forth in his bill of exceptions.

Wm. Strong & Sons, for appellant:

The deed offered in evidence by the respondent shows by its recitals that she held the land under a paper title, and concludes her from otherwise showing title to the property. A party who traces title through a regularly executed conveyance is concluded by its recitals. (3 Washburn on Real Property, 3d ed. 94, sec. 24; *Scott v. Douglas*, 7 Ohio, 227; 5 Id. 194; *Carver v. Jackson*, 4 Pet. 1; Id. 85-87.) In order to create title by prescription, there must be: 1. An actual occupancy, clear, definite, positive, and notorious; 2. It must be continued, adverse, and exclusive during the whole period prescribed by the statute; 3. It must be with an intention to claim title to the land occupied. (*Cook v. Babcock*, 11 Cush. 206; *Doswell v. De La Lanza*, 20 How. 32; *Grant v. Fowler*, 39 N. H. 101.)

To give possession, the requisite characteristics of being visible, notorious, distinct, and definite in its extent, the ouster, in the first place, must be of such notoriety that the owner may be presumed to have notice of it, and of its extent. (3 Washb. on Real Property, 127, sec. 22, and authorities there cited.) The entry upon the lands must be made with an intention to dispossess the owner, otherwise the act would be a mere trespass. (4 Kent's Com. 488; 2 Smith's Leading Cases, 6 Am. ed. 637; note; *Broadstreet v. Huntington*, 5 Pet. 401, 439.) Mere possession, without a claim of right, gives no title, however long the same may be continued. (*Grube v. Wells*, 34 Iowa, 148; *La Frambois v. Jackson*, 8 Cowen, 588, 603; *Adams v. Guice*, 30 Miss. 397.)

A party inclosing and occupying by mistake for the period of limitation more land than his deed called for, will not operate as a bar to the claim of the true owner. The possession is not deemed adverse. (*Howard v. Reedy*, 29 Ga. 152; 34 Iowa, 148; *Dow v. McKenney*, 64 Me. 138.) When two adjoining proprietors of land, who are ignorant of the true boundary line between their respective lands, fix a line

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with an agreement that each shall possess to that line until the true boundary is ascertained, and the true boundary, when ascertained, leaves one in possession of a portion of the other's land, this possession is not adverse. (3 Washb. on Real Property, 491; *Irvine v. Adler*, 44 Cal. 559; 34 Iowa, 148.) Evidence of a fence built merely for convenience, in working a farm, and not for the purpose of marking boundaries according to title, is of no weight in determining acts of possession. (*Soule v. Barlow*, 49 Vt. 329.) The testimony does not prove title by prescription to the land in controversy; if our position is correct, it follows that the court committed error in not granting the motion of defendant for a non-suit.

The court erred in not allowing the offered proofs showing plaintiff held under paper title; and in not admitting the deeds offered to show the true boundary line. Every presumption is in favor of possession continuing in the same subordination to a title, where it is once shown to exist. (*Hood v. Hood*, 2 Grant's Cas., Penn. 229.) A party's possession, if he enter under color of title, by deed, decree, etc., is often referred to the description of the premises in such deed or written instrument. (*Bell v. Longworth*, 6 Ind. 273; *Scales v. Cechill*, 3 Head. 436.) When the acts of disseisin are equivocal in their nature, the presumption always is that it is in accordance with, and not in hostility to the title of the true owner. (*Pipher v. Lodge*, 16 Serg. & R., 229, 231; *Smith v. Burtis*, 6 Johns. 218; *Jackson v. Sharp*, 9 Id. 163.) When two persons are in possession at the same time, under different claims of right, he has the seisin in whom is the true title. Both can not be seised, and the seisin consequently follows the title. (*Barr v. Gratz*, 4 Wheat. 213; *Kent's Com.* 482; *Codman v. Winslow*, 10 Mass. 146, 151.)

The court erred in not giving the instruction asked for by defendant. If a person enter on land having a title and right of entry, his entry and possession are presumed to be in conformity to his title. (*Means v. Welles*, 12 Met. 356; *Tappan v. Tappan*, 11 Fost. 41; *Wilson v. Williams*, 52 Miss. 487; *Loport v. Todd*, 3 Vroom, N. J. 124.)

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S. W. Rice and W. W. Thayer, for respondent:

The patent and the confirmatory deed form a direct chain of title from the United States to the respondent; and as the appellant has not pleaded any title in himself, he can not object to the respondent's claiming the property under any title she may have. The only objection he could bring, would be that it did not show that the respondent had any title. This confirmatory deed was duly executed and acknowledged, and is entitled to be admitted in evidence. (Civil Code, 518, sec. 22.) As to the second assignment of error: A direct legal chain of title had been proven, and also an uninterrupted adverse possession of the premises for more than twenty years, which is a presumption that the premises had been held pursuant to a written conveyance. (Gen. Laws of Oregon, 262, secs. 766-68.) Therefore a nonsuit was properly denied.

The deeds offered to be introduced must be presumed to have included a less area than the premises which the respondent had occupied adversely for more than twenty years, or the appellant would not have offered to introduce them in evidence, unless he wished to prove the respondent's case. But the respondent had been in adverse possession of the whole tract for more than twenty years, and the presumption was that she had a written conveyance to all the lands she had so occupied. (Gen. Laws of Oregon, p. 262, sec. 766-38.) The bill of exceptions says that these deeds were offered in evidence for the purpose of showing that the respondent held the land in dispute under a paper title. The appellant ought not to complain because the respondent declined to allow him to prove her case.

As to the fourth assignment of error: These deeds, if they would show anything, would be proving title in the appellant himself, which is not permissible, as he has not pleaded any such title. (Gen. Laws of Oregon, p. 176, sec. 316.)

By the Court, BOISE, J.:

In this case it was incumbent on the plaintiff to show

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that she had a legal estate in the property and a present right to the possession. (Civ. Code, sec. 313.) This she attempted to do: 1. By producing the patent of the heirs of Coueh, the original proprietor; and a confirmatory deed from her to plaintiff, to which we see no objection; 2. By producing evidence tending to prove that she, and those under whom she claimed, had been in adverse possession for twenty years; and we think the evidence was sufficient to make a *prima facie* case in her favor; and, therefore, the motion for a warrant was properly refused.

The next error is: That "the court erred in not admitting the deeds offered by defendant to prove that plaintiff held the land in dispute under a paper title, in which the land was described with certain specific boundaries." The defendant having simply denied the bill and right to possession of the plaintiff, and not having pleaded in his answer either that he was the owner, or that the title was in a third person, the evidence which the defendant could produce was restricted to a very narrow issue, and was very much more limited than in an action of ejectment at common law, for our statute has provided (p. 179, sec. 316) that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, * * * unless the same be pleaded in his answer." At common law, under the general issue (which is the issue in this case), the defendant could prove title in himself or another, so that most of the rules of law concerning evidence for the defense in ejectment, which have been established, and which are found in works on evidence and ejectment, are not applicable under our statute. We think, however, that the defendant was entitled to offer any evidence which had a tendency to weaken the claim of title under which the plaintiff claimed, for as the plaintiff must make out a *prima facie* case, the defendant might show flaws in that title. The confirmatory deed recites that this deed was to confirm a legal or equitable title, which the plaintiff held in possession "by mere conveyances from R. B. Wilson, by deed or instrument in writing, dated March 1, 1854, and recorded

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in the book of records, transferred from Washington county, p. 30."

The defendant offered these mesne conveyances in evidence to show that plaintiff's title and right of possession under them was confined to the north-west quarter of said block 30, and claimed that the boundaries of the north-west quarter differed from the boundaries of the land contained in lots 6 and 7, in block 30, which was the land described in the confirmatory deed. These deeds offered in evidence tended to show that Mrs. Couch, the patentee, had sold all of block 30 to R. B. Wilson, March 1, 1854, and that plaintiff, prior to the confirmatory deed, had acquired a paper title to the north-west quarter of block 30, and as Mrs. Couch had, in 1854, parted with all her title to block 30, her confirmatory deed gave nothing to plaintiff; that is, provided the deed of March 1, 1854, was in proper form, for Mrs. Couch and others could not grant to plaintiff land she did not own by reason of its having been before conveyed, and we must presume the deeds were in proper form, for no objection was made to their form, the objections being only to their materiality and relevancy as evidence. We think, also, that these deeds might be material to limit and determine the boundaries of the land the plaintiff took under her paper title which she had offered in evidence, even if they only conveyed an equity, for these deeds constituted the paper title on which she entered the premises, and were the consideration of the confirmatory deed relied on to recover, for we must suppose that she relied on her paper title as well as on her evidence of possession, as both the evidence of the paper title and the possession were submitted to the jury to support her right to recover.

These deeds had a tendency to show that her right under them was only to the north-west quarter of block 30, and did explain and limit the land intended to be conveyed in the confirmatory deed, for where a confirmatory deed refers to the deed which it is intended to confirm, and there is a difference in description between the confirmatory deed and the deed to be confirmed, the description in the latter should prevail, for the reason that it describes the land

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which was originally sold, and for which the consideration was paid, unless it appear that the confirmatory deed was to correct an error in description, which is not the case here, the confirmatory deed being to remedy errors of form, or "informalities." This evidence tended only to show to the jury the boundaries of the plaintiff's land, and should have been admitted for that purpose, and she having by the recital in her confirmatory deed made them a part of her muniments of title, could not properly refuse to be controlled by their contents. We think, therefore, that there was error in not allowing these deeds to be given in evidence.

It is claimed that the respondent having shown possession for twenty years, raised a presumption of a written conveyance of the land in dispute. Whether the evidence on this point showed an adverse possession for twenty years, of the strip of land in dispute, which was less than one foot in width, and on the boundary of the plaintiff's land, was a question for the jury. Any evidence by the defendant tending to show that the plaintiff had not occupied said land, or had not claimed it as hers, during the twenty years, was competent; and on this question of adverse possession, we think the defendant might show under what claim plaintiff entered it, and to what boundary the original possession extended; and if she entered under a deed, the deed would be evidence of the extent of the possession claimed under it, and in this case, the plaintiff in her testimony says that she was not in possession of the whole of lots numbers 6 and 7, of said fractional block 30. That she now resides on the north-west quarter of said block. That her husband John Phillippi, bought said place in the year 1858, and that she is his widow, and is the owner of the land at the present time. That ever since her husband bought said land, an old fence built by one Ebinger, a former owner of said land, has stood between the land claimed by plaintiff and defendant in this action, and that she claimed all the land on the north side of said old fence, and had been in fact in possession of the same since the said purchase by her husband. This testimony refers to the purchase of this land

Points decided.

from Ebinger, and as this purchase was by deed, the possession taken under the deed would only extend to the boundaries named in the deed; and if Ebinger had fenced in land not included in the deed, such land would not pass by the deed, and such deed would be evidence of the original extent of the possession under it, and was proper evidence in this case to show what land John Phillipi took possession of. If he afterwards or immediately took possession of other land, that could be proved by acts of possession on the land itself, and not by acts of possession under the deed which excludes it.

To be more explicit, she claims that her husband purchased this land of Ebinger, and that this fence was its boundary; this purchase being by deed, which describes the land as the north-west quarter of block 30. This fence is not a monument, and whether or not it was on the boundary must be determined by the deed and the parol evidence, and if the strip of land in controversy has become hers by adverse possession, she must have claimed and occupied it otherwise than under the deed, for when we settle her claim under the deed, its extent must be determined by the deed, and where a person enters under a deed, he will be presumed to hold under it and to the boundaries fixed in it, until the contrary is shown. As is said in *Tappan v. Tappan*, 11 Foster, 41, "A party entering on land under color of title, is presumed to enter and occupy according to his title." (See also *Meares v. Wells*, 12 Met. 356; *Wilson v. Williams*, 52 Miss. 487.)

For the reasons assigned, we think the judgment of the circuit court should be reversed, and a new trial ordered.

J. C. TRULLINGER, RESPONDENT, *v.* N. KOFOED ET AL.,
APPELLANTS.

DISTRIBUTION OF PROCEEDS, ON RESALE OF PROPERTY.—When a sheriff's sale of real property is set aside by the judgment of the supreme court, and a resale of the premises is ordered, such resale must be made in conformity with section 293, subdivisions 3 and 4, on page 169 of the Code. And if, upon such resale, the property shall be sold to any person other than the former purchaser, the court must first repay the former purchaser the amount of his bid, out of the proceeds of the resale.

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APPEAL from Clatsop County. The facts are stated in the opinion.

O. F. Bell, for appellant.

Robb and Fulton, for respondents.

By the Court, KELLY, C. J.:

At the January term, 1878, of the circuit court for Clatsop county, a decree was rendered in favor of certain mechanic lien claimants against the defendants, N. Kofoed and Mary Kofoed. The decree directed a certain building and lot of ground to be sold, and the proceeds to be distributed among the several claimants. In the decree, precedence was given to the claim of Peter Runey, one of the defendants, over that of B. G. Crane, the appellant. The house and lot were sold upon execution, on the nineteenth day of March, 1878, to W. W. Parker, for four thousand two hundred and eighteen dollars and twenty cents. The purchase money was paid to the clerk, and the sheriff's sale was afterwards confirmed. After the sheriff's sale was made, B. G. Crane appealed to the supreme court from the decree adjusting the liens of the different claimants, and also from the order confirming the sheriff's sale. Both appeals were heard at the last term of this court. The decree in relation to the several liens was so modified as to give preference to the claim of Crane over that of Runey.

The order confirming the sheriff's sale was reversed and this order entered: "It is further ordered that this cause be remanded to the court below, with directions that a resale of the above-described premises be had herein, and for such further proceedings as are by law required."

When an order of resale is made, the manner of making the sale is prescribed in section 293, subdivisions 3 and 4, on page 169, of the code.

Upon the mandate of this court being filed in the court below, the following order was made: "Upon the foregoing mandate order of the supreme court and upon the motion of O. F. Bell, esq., counsel for the defendant and appellant, B. G. Crane, filed herein, it is ordered that execution issue

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to enforce the said decree and order of the supreme court; that upon execution the property described in the said decree be resold as provided for in section 293 of the code of civil procedure; that if upon such resale the said property shall bring a greater amount than upon the sale already had under the order of this court, the said excess, after paying to the former purchaser the amount of his bid, if sold to any other person than such purchaser, shall be paid to the clerk of the court to be distributed as directed in said decree and order of the supreme court."

This order is in conformity with the provisions of the section referred to, and the court did not err in making it.

The judgment of the court below is affirmed, with costs.

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J. B. PRICE ET AL., APPELLANTS, v. LEVI KNOTT AND A. J. KNOTT, RESPONDENTS.

ACT OF THE LEGISLATURE CONSTRUED—FERRY FRANCHISE.—The act of the legislature of the late territory, passed January 15, 1852, granting a ferry right to James B. Stephens across the Willamette river, at Portland, granted but one ferry, with fixed landings on each side of the river. The exclusive right to said Stephens to do all the ferrying across said river, within certain limits, for ten years, expired at the end of said ten years.

IDEAL.—One ferry consists of one line of boats on one line of travel. The owners of this franchise, having a line of boats running as a ferry from Stark street to a point opposite in East Portland, the right to run this ferry does not grant them a right to run another line of boats from Oak street to a point opposite in East Portland.

STREETS—WHAT GRADE CITY MAY ESTABLISH.—The authorities of the city of Portland have control of the grading of the streets of the city, and may grade them down or elevate them when they approach the river, as the exigencies of travel or commerce shall require.

INJUNCTION—ADJACENT LOT OWNER MAY SUE OUT, WHEN.—One owning a lot next to the river may lawfully claim an injunction against a private citizen who threatens to grade down a street next to the river, and adjoining the lot of such owner, if he shows in his complaint that such grading will permanently injure his improvements on said lot, or render its enjoyment less convenient.

APPEAL from Multnomah County.

This is a suit in equity, brought by plaintiffs to restrain defendants from digging or altering the ground or grade of

Statement of Facts.

Oak street, between the east line of Front street and the Willamette river, in the city of Portland, and further asking that the defendants be enjoined and restrained from, in any manner whatever, interfering with, changing, injuring, or destroying certain roadways and a wharf erected by the plaintiffs, Rines and Newhouse, for the purpose of a wood-yard, upon and in front of the south half of said portion of Oak street; and for one hundred dollars damages for the injury already done plaintiffs by digging down said street by defendants.

The plaintiffs rest their cause of suit substantially upon the facts: That Rosetta Sherlock is the owner of the south half of lot four, in block eighty-one, lying immediately north of said portion of Oak street; that J. B. Price is the owner of lot one, in block eighty, lying immediately south of said portion of Oak street, and that Rines and Newhouse are lessees of said Price, of the rear or river end of said premises, and that they have constructed a wharf in the river opposite said premises and extending north in front of the street to the center line of said Oak street extending into the river, and have built two roadways leading to said wharf; that they built said wharf and roadways by permission of the common council of the city of Portland, as per ordinance No. 1911; that if said portion of Oak street between the east line of Front street and the Willamette river is graded down to the water line of the river, the foundation walls of the buildings occupying the ground on either side of that portion of said street will be injured; that Rosetta Sherlock contemplates building a wharf in the rear of her property, and extending into the river, and if the street be so graded, she, upon the one side, and J. Price and Rines and Newhouse upon the other side of the street, will be deprived of access to their several wharves from the foot of Oak street.

Rines and Newhouse also complain of defendants for attempting to dig and to tear down and destroy said roadways therein and the wharf in front of the south half of said street. It is sufficient to state that no actual damage has been shown to have been sustained by the digging, etc.,

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heretofore done by the defendants, the object of defendants in digging, etc., being to test the validity of Ordinance No. 1911, and to ascertain, by the decision of the courts, the respective rights of plaintiffs as adjoining property holders, and the power of the municipality to grant the easement of public streets to the exclusive use and benefit of private individuals. The defendants claim the right to use the foot of the street as a ferry landing, under a charter of the legislature of the territory of Oregon passed January 17, 1852, and as an incident to that franchise, the right to grade down the street so as to make it suitable for such landing. That the accommodation of public travel over the Willamette river requires that they should use the terminus of Oak street as a ferry landing. They also present, as a separate and independent defense, their right as members of the general public to travel over the said street, and they complain that said wharf and roadway so erected are nuisances, and may be abated by any one desiring to use said portion of said street as a highway.

Upon the trial below, the court there found: That Oak street in the city of Portland extending to the Willamette river is a public highway, and that the wharf and roadway situate in the foot of said street is an obstruction to said highway. That defendants are the owners of the ferry franchise, and have good right and authority to land their ferry boats at the foot of said Oak street, and to so grade the foot of said street as to render the same a suitable roadway, between Front street and the Willamette river, for all purposes of public travel, and had the right to remove said wharf and roadways. And thereupon dismissed plaintiffs' suit.

Dolph, Bronaugh, Dolph & Simon, and Wm. Strong & Sons, for appellants.

H. T. Bingham, for respondents.

By the Court, Boise, J.:

The defendants, A. J. and Levy Knott, claim the right to grade the foot of Oak street, in the city of Portland, to

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make it convenient to be used by them as a ferry landing for their ferry which plies across the Willamette river, between West and East Portland. They now have one fixed landing for their ferry, at the foot of Stark street, which is the next street south of said Oak street, and about two hundred feet from it. But they claim that the increase of business on their ferry requires additional means of transportation, and that to accommodate the travel, they want to put on another line of boats, and make a landing at said Oak street. The ferry franchise under which the Knotts' claim was granted to James B. Stephens, by an act of the legislature of the late territorial government of Oregon, and they have the right by purchase from Stephens, and claim that under this franchise they have the exclusive right of ferriage for one mile each way up and down the river from their present landing at said Stark street. The appellants claim that the Knotts have a right to only a single ferry and one line of boats, and if they wish to establish another line, they must get the right to do so by a license from the county court under the general law regulating ferries in this state.

It becomes necessary, therefore, for us to construe said act of the territorial legislature to determine the extent of the franchise granted by it. The act is as follows:

“An act to authorize James B. Stevens to establish a horse or steamboat ferry across the Willamette river.

“Section 1. Be it enacted by the legislative assembly of the territory of Oregon: That James B. Stephens, his heirs and assigns, be and they are hereby authorized to establish and keep a ferry across the Willamette river at the city of Portland, in Washington county, to the county of Clackamas, on the east side of said river, opposite, within the following limits: Commencing at a point in said city of Portland, at the junction of — street, the present ferry landing of said Stephens, and to land on, and deposit, from each shore of said river, as well in the county of Clackamas, due east of said point of commencing, as in the county of Washington, and extending from said points up and down said river, on each side thereof, one mile each way;

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and that the said James B. Stephens has the exclusive privilege of ferrying in Washington and Clackamas counties, within the above limits, for the term of ten years from the passage of this act. *Provided*, that said ferry, when so established, shall be subject to the same regulations and under the same restrictions as other ferries are, or may hereafter be, by the laws of this territory fixing the rates of toll, and prescribing the manner in which licensed ferries shall be kept and regulated.

“Sec. 2. That no courts or board of county commissioners shall authorize any person, except as hereinafter provided for in this act, to keep a ferry within the limits set out in this act. *Provided*, that the said James B. Stephens, his heirs or assigns, shall, within eighteen months after the passage of this act, procure for said ferry a good and sufficient horse or steam ferry-boat, which shall be kept at said ferry for the transportation of all persons and their property across said river, without delay, and until said ferry-boat shall be provided as aforesaid, the said James B. Stephens shall keep at said ferry a good and sufficient number of flat boats, with a sufficient number of hands to work the same for the transportation of all persons and their property across said river (when possible) without delay; and should the laws regulating ferries now, or such as may hereinafter be in force, be violated by the said James B. Stephens, his heirs or assigns, or if no good and sufficient horse or steam ferry-boat be provided at the time required by this act, upon proof thereof to be made to the satisfaction of the board of county commissioners, or probate courts of the counties of Washington and Clackamas, then this act shall be void.

“Sec. 3. This act to take effect and be in force from and after its passage.

“Passed the house of representatives, January 15, 1852.

“Passed the council, January 17, 1852.”

We are not authorized in construing this act to extend the grant in favor of the grantee beyond the fair and natural meaning of the language used, for when the legislature grants a franchise which is in the nature of a monopoly, and which, necessarily to some extent, restricts the powers of

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future legislatures, nothing is to be presumed beyond the express words of the grant. Cooley's Constitutional Limitation, 394.

In this case the manifest intention of the legislature was to grant to Stephens a right to keep a ferry from certain fixed points, and provided that said ferry, when so established, should be subject to the same regulations as other ferries are, as to rates of toll. The act grants but one ferry, and if the exclusive right of ferrying for ten years within the limits of two miles, had in that time required more than one ferry to do the business, such other ferry would have been subject to the regulations imposed on other ferries. But this exclusive right does not need construction, for it was limited to ten years, and has long since ceased to exist, and since the expiration of ten years from the date of the act, the Knotts have had but one ferry right under this act, and that is confined to the landing on Stark street. As is said in the case of *Mills v. Learn*, 2 Or. 217. "The ferry is a part of the road and the landings are upon the highway and within its limits," and the proprietor can not change it from one street or highway to another, without the authority of the county court.

So we conclude that under this act the Knotts had no authority to grade down the foot of Oak street, and can not therefore justify under that authority. We will next consider the question whether the plaintiffs, from the facts alleged, have a standing in court to claim an injunction against the Knotts in this suit. They claim, 1. "That being the owners of the adjoining lots, they are thereby made the owners of the street, each to the center; 2. That they have a right to occupy the street or a part thereof under the authority or license from the city authorities; and 3. That if these propositions are not correct, they have the right to have the defendants restrained from altering the grade of the street so as to render access to their property more difficult."

The first of these propositions is simply a question of law and we think it is not necessary to decide it in this case,

Points decided.

and as it was not very fully discussed we will not express an opinion thereon at this time.

As to the second proposition, as to the power of the city to grant a license to occupy the street by the plaintiffs with their roadway, we think the city authorities have under the charter full power to grade down or build up the streets, so as to facilitate travel or contribute to the convenience of landing from boats and vessels. But we do not wish to be understood as holding that the city authorities can confer any rights of property in the streets on private individuals, or incumber them with licenses to adjoining lot holders, to the detriment of the general public, for they hold the control and management of the streets for the benefit of the public. As to the third proposition, that the plaintiffs have a right to claim that the defendants be restrained from altering the grade of the streets so as to render access to their adjoining property less convenient, we think they have that right, and that no one other than the city can alter the grade of the street to their injury, and that any adjoining proprietor may invoke the aid of the court to prevent the grading of a street whereby this property is made much less secure as to his improvements, or made less convenient of access. And we think the acts complained of were such as would injure the plaintiff's property. (High on Inj. 408; *Shurmier v. St. Paul*, 10 Minn. 82; *City of Delphi v. Evans*, 36 Ind. 90.)

We think, therefore, that the defendants should be enjoined from interfering with or altering the grade of the foot of Oak street, and that a decree should be entered to that effect.

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**DOLLY BENNETT, RESPONDENT, *v.* THOS. STEPHENS,
APPELLANT.**

PRACTICE—DISCRETION OF THE COURT TO ADMIT EVIDENCE, IN WHAT CASE—

As a general rule, it is a matter resting in the discretion of the judge to receive, at any convenient stage of the trial, any evidence which counsel undertakes to produce and shows will be rendered material by other evidence, and if not subsequently connected with the issue, to be laid out of the case; and the exercise of such discretion is not reviewable.

Statement of Facts.

PLEADING—ACTION FOR WAGES—DEFENSE, WHEN MUST BE PLEADED.

Evidence tending to show that respondent was poor and in indigent circumstances at the time when she entered into the service of the appellant was not admissible, for the reason that the answer contained no such averment as a ground of defense.

SERVICES BY A PAUPER—PROMISE TO PAY NOT IMPLIED.—Where service has been performed for a relative, or by a person who is a pauper or in indigent circumstances, the law will not imply a promise to pay for such service, but an *express* hiring must be *proved* in order to support a claim for wages.**AGREEMENT FOR WAGES PENDING GRATUITOUS SERVICE, WHAT WILL CONSTITUTE.**—B., while a minor, entered the service of S. as a member of his family, with the understanding that she was not to have pay for such service; but subsequently she expressed dissatisfaction to S. that she was not receiving pay for her services; whereupon S. told her "he would pay her for her work." *Held*, that this constituted an understanding or agreement of hiring, and that B. was entitled to recover their reasonable value for services thereafter rendered, notwithstanding the agreement under which the services were originally begun.**APPEAL from Multnomah County.**

This action was brought by the respondent to recover wages at the rate of twenty dollars a month, for her services rendered to defendant in the capacity of a house-servant and dairy-maid for a period of over nine years. The complaint is the ordinary one for labor and services. The answer of the defendant denies all of the material allegations of the complaint, and also sets up as separate defenses:

1. The statute of limitations in regard to all of the wages that accrued more than six years preceding the commencement of the action; and, 2. That said services had been rendered by plaintiff under agreement as a member of the family, and not as a servant for hire, and that it was understood and agreed that she was to reside in the family of defendant as one of that family, and was to receive no pay for any work she might render, except her support as such member of the family.

Some thirteen years before this action, the defendant, then a girl of seventeen years, entered the service of the appellant, where she remained as a "maid-of-all-work" until July, 1879. The evidence tended to show, that after remaining in the appellant's family some four years, the re-

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spondent complained to the appellant that she was not receiving anything for her services, and that the latter replied that "she need not complain; that he would pay her for her work; that he wanted no one to work for him for nothing."

The appellant offered to prove that the respondent was in indigent circumstances when she entered his service, for the purpose of showing that respondent's services were rendered as those of a pauper, but the evidence was not admitted. The appellant also offered to prove a contract for the respondent's services, made between the appellant and a cousin of the respondent, but the testimony was rejected upon the ground that unless the cousin's authority, or a ratification by the respondent, was shown, the respondent would not be bound by any agreement between the appellant and such cousin. Counsel for the appellant then stated that he offered to prove the respondent's assent to the alleged agreement, but took no steps towards the production of such evidence, and no further order was made by the court.

Such other facts as are necessary to an understanding of the points decided are stated in the opinion.

Wm. Strong & Sons, for appellant.

Gibbs & Bingham, for respondent.

By the Court, PRIM, J.:

The first assignment of error is that the court erred in excluding evidence of the agreement made between appellant and respondent's cousin, under which she entered into the household of appellant. This was very properly refused by the court, upon the ground that any arrangement made by the cousin for the respondent would not bind her unless it was shown that the cousin had some authority to bind her, or that she had given or adopted his agency. Upon this ruling of the court, counsel stated that he proposed to prove by said witness and others, to be thereafter produced, that said arrangement or agreement was entered into with the assent of the respondent. It was then discretionary with the judge to admit the evidence, and if not subsequently

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connected with the issue, by showing that the arrangement was made with respondent's assent, to be laid out of the case. Thus it will be seen that the court committed no error in making this ruling, as it was a matter resting in the discretion of the court, and not a subject of review by this court. (1 Phillips on Ev. 103; 1 Greenl. Ev. sec. 51.) It appears, however, from the bill of exceptions, that the witness was afterwards allowed, without objection, to state what said arrangement was, which would have cured the error complained of, if there had been any.

The second assignment is, that the court erred in refusing to allow appellant to ask respondent, while on the stand, as a witness, how much money she had at the time she went to appellant's to live. If the answer of appellant had contained an averment that she had been received into appellant's services a pauper, or indigent person, as a ground of defense, this evidence would have been admissible; but as it did not, it was not error to exclude it.

The third assignment of error is, that the court erred in its first instruction to the jury, which reads as follows:

"Where one person renders valuable services for another, the law implies a promise on the part of the party benefited, to pay so much as such services are reasonably worth, and this is the general rule where no express contract for such service exists. There are these exceptions to the rule: If the service has been for a near relative, or by a person who is a pauper, or in indigent circumstances, the law will not imply a promise to pay; in such case the party may recover if there is an agreement to pay, but not otherwise. In the absence of an express contract between the parties, a hiring may be presumed from the mere fact of the service unless the service has been with near relations. If a man, for example, serves a stranger in the capacity of a clerk, or of a menial servant, or servant in husbandry, for a continued period, the law presumes that the service has been rendered in fulfillment of a contract of hiring and service, and if the party has served without anything being said as to wages, the law presumes that there was a contract for customary and reasonable wages. But if the service has been with the parent, or

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uncle, or other near relation of the party serving, a hiring can not be implied or presumed from it, but an express hiring must be proved in order to support a claim for wages, for the law regards services rendered by near relations to one another, as gratuitous acts of kindness and charity, and does not presume that they are to be paid for unless there is an express contract to that effect. And if a poor person is taken, out of charity, and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue."

No particular objection is pointed out in the exception taken to this instruction, and we are unable to see any that could have operated to the prejudice of appellant. It is a mere statement of the law applicable to the various propositions presented by the pleadings and evidence in the case.

The fifth assignment of error is, that the court erred in its fourth instruction, which is as follows:

"That this case must be decided upon its own circumstances. If you are satisfied from all the circumstances of the case that the plaintiff rendered the defendant valuable services in the expectation that she was to receive so much as such services were reasonably worth, and on the expectation upon the part of the defendant to pay her the reasonable value of the services, then she is entitled to receive such reasonable value in this case, and if the services were originally as a member of the family of the defendant on account of the near relationship between the plaintiff and defendant, or because the plaintiff was a pauper or indigent person, and yet you are satisfied from all the circumstances of the case that the last six years of said service was rendered with the expectation on her part and on the part of Thomas Stephens, the defendant, that she should be paid the reasonable value of her service, in that case the plaintiff will be entitled to recover such reasonable value."

It is assumed, on behalf of appellant, that in effect this was equivalent to instructing that a contract of hiring might be implied from the mere services of the respondent, although rendered as a member of the family and not in the

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capacity of a servant. If such were its proper meaning it was erroneous, but we do not so understand it. It must be considered in the light of the evidence and in connection with other portions of the charge. The court had already instructed that "if the service had been with the present uncle, or other near relative of the party serving, a *hiring* could not be *implied* or *presumed* from it, but an express hiring must be proved in order to support a claim for wages, * * * as the law regards such services as gratuitous, and does not *presume* that they are to be paid for unless there is an express contract to that effect." The court had further instructed to the effect that "if a poor person is taken out of charity and provided with food, lodging, clothing, and other necessaries, and set to work, no contract of hiring could be *implied* therefrom, however long the party may continue to serve."

It appears from the evidence that appellant lived upon a farm and was keeping a dairy, and that when respondent went there to live she was not a mere child, but a girl seventeen years old, and able to do a woman's work, and that the services of such girls were worth twenty dollars per month in that neighborhood; that she remained with the family for thirteen years, doing such work as was required of her, such as cooking, caring for horses, cattle, and hogs, milking cows and driving them to and from pasture, etc.; that shortly after she went to appellant's, he told her he would send her to school, but never did so; that upon several occasions she told appellant she was not satisfied; that her sister was getting regular wages while she was getting nothing, to which appellant replied that "she need not complain; that he would *pay* her for her work; that he *wanted no one to work for him for nothing*."

Here was a plain understanding or agreement entered into between the parties that respondent was to be paid whatever her services were reasonably worth, and instruction number four is essentially based upon this evidence. It was to the effect that if the jury were satisfied from all the evidence in the case that the respondent rendered valuable services in the expectation, or with the understanding, that

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she was to receive so much as such services were reasonably worth, and upon the understanding on the part of the appellant to pay her the reasonable value of the services, then she was entitled to recover such reasonable value. And if they were further satisfied from all the evidence that the services were originally rendered as a member of the family of the appellant, or because she was a pauper, or an indigent person, and yet if they were satisfied from all the evidence in the case that the last six years of said service was rendered with the understanding on the part of both parties that she should be paid the reasonable value of her service, the respondent was entitled to recover such reasonable value. We are unable to see any objection to this instruction when considered in the light of the evidence and in connection with other portions of the charge.

There was evidence tending to show that she originally entered into the service of the appellant as a member of his family, with the understanding that she was not to receive wages for her service; and there was also evidence tending to show that after she became of lawful age, that agreement or understanding was rescinded and another agreement entered into between the parties, by which she should be paid whatever her services were reasonably worth. Under such evidence, it was proper to instruct the jury that she had a right to rescind the original arrangement and enter into another, by which she should be paid whatever her services were reasonably worth, and that she had a right to recover for any service thereafter performed under said new agreement.

Entertaining the views herein expressed, it follows that the judgment of the court below should be affirmed, which is accordingly ordered.

Statement of Facts.

C. M. ROHR, RESPONDENT, v. S. ISAACS, APPELLANT.

PRACTICE—AMENDMENTS ON APPEAL.—The plaintiff, in an action brought in a justice's court, made an oral reply to a counter-claim set up by the defendant in his answer, but such oral reply was not entered by the justice in his docket. The justice proceeded to try the case, and after hearing the testimony of the parties, disallowed the greater portion of the counter-claim, whereupon the defendant appealed to the circuit court: *Held*, that it was not error in the circuit court to allow a reply to be filed in that court, so as to present for trial the same issue which was, in fact, tried in the justice's court.

ITEM—SPECIAL FINDINGS—QUESTIONS WITHDRAWN BEFORE VERDICT.—The submission of particular questions of fact to be answered by the jury in addition to their general verdict, is a matter of discretion with the court, and the submission may be withdrawn by the court at any time before the jury have found a special verdict on the particular questions submitted to them.

APPEAL from Multnomah County.

This was an action commenced in a justice's court by the respondent, to recover from the appellant the sum of forty-seven dollars, less a credit of twenty dollars and sixty-four cents, which he allowed to appellant. The balance claimed was twenty-six dollars and thirty-six cents. The appellant filed an answer, admitting that the respondent had a just demand for forty-five dollars, but claimed a larger credit, amounting to thirty dollars and ninety-six cents. He then, for a further answer, by way of a counter-claim, alleged that the respondent was indebted to him in the sum of two hundred and fifty-five dollars, and demanded a judgment for two hundred and forty dollars and ninety-six cents. No reply was filed by the respondent to the new matter set up in the answer, nor was there any entry made in the justice's docket, to the effect that an oral reply had been made to the new matter, so set forth in the answer. The parties proceeded to the hearing of the cause before the justice.

The respondent and two others testified in his behalf, when he rested his case. The appellant then filed a motion for judgment in his favor, for two hundred and forty dollars and ninety-six cents, for want of a reply, which motion was overruled by the justice. The trial then proceeded, and

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the appellant called and examined a number of witnesses in his behalf. After hearing the case, the justice rendered a judgment in favor of the respondent for nineteen dollars and twenty cents, from which an appeal was taken to the circuit court.

The appellant then moved for judgment on the pleadings in that court, which motion was taken under advisement, pending which the respondent moved the court for an order on the justice to supply and perfect the transcript, which order was made. In return to this, the justice certified that after the answer was filed, the respondent replied orally to the new matter set up in the answer, virtually denying the same; and that by inadvertence the same was not entered on his docket. Two or three counter-affidavits were filed by appellant, denying that oral reply was made as certified by the justice. The circuit court overruled the motion for judgment on the pleadings, and allowed the respondent to file a reply denying the new matter set up in the answer as a counter-claim.

On the trial in the circuit court, the jury were directed by the court to find a general verdict upon the issues tried, and in addition to find as a question of fact what was the value of certain slaughter-house offal, sold and delivered by appellant to respondent, as set forth in the answer as a counter-claim. The jury rendered a general verdict in favor of respondent, for eighteen dollars and seventy-two cents, but failed to find on the question of fact submitted to them. The court directed them to retire and find on the question of fact. After being out some time, one of the jurors became sick, and they were discharged without finding a special verdict. Judgment was then entered on the general verdict.

E. Mendenhall and John B. Waldo, for appellant.

Moreland & Tanner, for respondent.

By the Court, KELLY, C. J.:

The appellant claims that the court erred in its refusal to render judgment in his favor on the pleadings, as filed in

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the justice's court, and in allowing the respondent to file a reply in the circuit court. The statute in relation to the proceedings in justices' courts, section 80, page 473, of the code, provides that "the appellate court may, in furtherance of justice, and upon such terms as may be just, allow the pleadings in the action to be amended, so as not to substantially change the issue tried in the justice's court, or introduce any new cause of action or defense." In justices' courts the pleadings are made orally or in writing, as the parties to the act may desire. The object which the legislature had in view by so providing, was to enable the parties litigant to try their cases without going to the expense of employing counsel, if they think proper to do so. Often they are so small that the amount in controversy will not justify the employment of attorneys to conduct them, and especially is this so in country precincts remote from the county seats where lawyers usually reside. In justices' courts, where parties try their own cases, formality or exactness in pleading is not expected nor required. And when appeals are taken in such cases, the circuit courts are and always have been liberal in allowing the pleadings to be so amended as to present the issues which were in fact tried in the justice's court, whether they were there made by the pleadings or not.

In this case there can be no doubt that one of the issues tried in the justice's court was, whether the counter-claim of the appellant was a just one or not. It was undoubtedly contested by the respondent, for the greater portion of it was disallowed by the justice after hearing the testimony on both sides. As it was an issue which was in fact tried before the justice, the circuit court very properly allowed a formal reply to be filed, so that the same issue might again be tried in that court. The appellant also contends that the court erred in withdrawing from the jury the particular question of fact upon which they were directed to find, and in discharging them after they had rendered a general verdict in favor of respondent. The submission of particular questions of fact to be answered by the jury, in addition to their general verdict, is a matter of discretion with the

Statement of Facts.

court. Neither of the parties can demand it as a matter of right, and being purely a matter of discretion with the court, we think this discretion may be withdrawn at any time before the jury have found a special verdict on the particular question or questions submitted to them. (*Moss v. Priest*, 19 Abb. Pr. 314.)

Some other exceptions were taken to the refusal of the court to charge the jury as requested by the counsel for appellant. They have not, however, been pressed upon the consideration of the court in the argument of the case, and are therefore presumed to have been abandoned. The instructions asked were mere abstract propositions of law, which the court was under no obligation to give.

The judgment of the court below is affirmed, with costs.

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8	454
428	421
36	423

**D. P. THOMPSON, RESPONDENT, *v.* ANDREW WOOLF,
APPELLANT.**

SUIT TO QUIET TITLE—POSSESSION WHEN LANDS ARE WILD.—One owning wild lands which he holds by deed from one seised by deed, is in such possession as to enable him to bring a suit in equity to remove a cloud from the title, under section 500 of the code.

EVIDENCE—PEDIGREE—DECLARATIONS OF DECEASED PERSONS.—Declarations of deceased person or persons out of the state, who were or are relatives of a family, may be received as evidence of pedigree. But before such declarations can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations.

APPEAL from Washington County.

The complaint alleges, in substance, that respondent is the owner of a certain tract of land, and "by virtue of his title" is in possession thereof. That appellant has a sheriff's deed to said lands, under a tax sale, and that such deed is void and constitutes a cloud on the respondent's title. To prove his title, the respondent offered what purported to be a deed from Green C. Caruthers and eighteen others in the state of Arkansas, dated August 8, 1869, and purporting to convey to B. Goldsmith the interests of the said nineteen grantors in "all the estate, both real, personal, and mixed,

Opinion of the Court—Boise, J.

of which Finice Caruthers, whose real name was Finice Thomas, lately deceased, in said county of Multnomah, died possessed." No specific interest is mentioned in said deed, and the lands in controversy herein are described as a part of that estate. Respondent then offered quitclaim deeds from B. Goldsmith to the South Portland Real Estate Association, and from S. P. R. E. A. to respondent, each purporting to convey the same lands as the Arkansas deed.

T. B. Handley, and Thayer & Williams, for appellant.

B. Killen, for respondent.

By the Court, Boise, J.:

It is claimed by the appellant that the respondent has not shown such a possession of the land as to entitle him to maintain this suit under section 500 of the code. The possession claimed by respondent is constructive and results from deraigning his title by mesne conveyances from the heirs-at-law of Finice Caruthers, deceased. If his title is perfect, we think he would be in constructive possession without making an actual entry, for the heir becomes seised and presented without entry. (1 Washburn on Real Property, p. 48, sec. 81; *Brown v. Wood*, 17 Mass. 68.) And a deed from one in possession confers seisin on the grantee without entry, and such constructive possession has been held sufficient to support a suit in partition. (*Brownwell v. Brownwell*, 19 Wend. 369; *Beebee and wife v. Griffing*, 14 N. Y. 235.) And such possession has been held sufficient in this state in practice in the circuit courts, in cases of partition. And if constructive possession is sufficient to give the court jurisdiction in cases of partition, we do not see any reason why such possession should not suffice in suits under section 500. For the language conferring the jurisdiction is the same in both cases so far as requiring possession is concerned. We think, therefore, that the possession alleged is sufficient.

The appellant claims that the evidence produced by the respondent is not sufficient to show *prima facie* that the persons who claim to be heirs of Finice Caruthers, and from

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whom respondent seeks to deraign title, are such heirs. All the evidence on this subject is contained in the deposition of A. C. Gibbs, who testified that he knew Finice Caruthers in his life-time quite intimately, about the fall of 1858, in Portland, Oregon, and was his attorney, and on being asked what was his true name, said, I suppose it was Finice E. Thomas. This answer was objected to, and was incompetent as being merely the opinion of the witness. He also says that he knew the mother of Finice; that he was not acquainted with her, but had seen her. Then, on being asked "what was her name," he answered, "Her name was Elizabeth Thomas, but she went by the name of Elizabeth Caruthers. She and Finice lived together near Portland, and recognized each other as mother and son." His testimony is then as follows:

"Q. 8. What blood relatives did Finice Caruthers have at the time of his death? State fully their relation, names, and places of residence, and your means of knowledge concerning their relationship?

"A. 8. He left relatives on his mother's side who were cousins; none nearer than cousins that I know of. Those whom I have seen and now remember, are Green C. Caruthers; Jackson Caruthers; Mary Ann Mauldin, subsequently married and known by another name; Lonisa Caruthers, the wife of a man by the name of Newman, first name I don't remember; also the wife of a man by the name of Chilcoat, all of or near Circe, White county, Arkansas. I also knew John Caruthers, Allen Caruthers, and another man by the name of Caruthers whose first name I don't remember, a brother of the other two, who resided at Waverley, Illinois. I visited this family at Waverley, Illinois, and spent several days with them. I also visited the persons above named residing in White county, Arkansas, at two different times. One time I spent from one to two weeks with Green C. Caruthers. While in White county, I became acquainted with some fifteen or twenty members of the same family, and conversed with them often and freely with reference to their relationship to Finice Caruthers. At the time of some of these conversations, I had with me

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the family circle or diagram now presented; I mean, not the same paper, but a copy of the same, which I now present and offer as a part of my answer. From statements made to me by these various persons, and particularly the older ones; and from correspondence that I had had with some of them and others of the family for some six or eight years, I gained the information as to their relationship to Finice Caruthers. I should add, by way of modification of the above, that a part of the family circle above referred to, was made up from information derived on those trips.

“Q. 9. Are any of the persons, whose names you have given above, now residing or in the state of Oregon?

“A. 9. None of the persons I have named, that I know of, reside in Oregon. There are one or two children of Samuel Caruthers, referred to in the diagram, who reside in Oregon.

“Q. 10. How do these cousins of whom you have spoken trace their relationship to Finice Thomas, commonly called Finice Caruthers?

“A. 10. The head of the family were John and Polly Caruthers of Charlotte, Dixon county, Tennessee; Elizabeth Thomas, called Elizabeth Caruthers, was a daughter of John and Polly. The other persons I have referred to are children and descendants from the brothers and sisters of Elizabeth Caruthers.

“Q. 11. When did these aunts and uncles of Finice die?

“A. 11. I can't state; I have information on memorandums and in letters, but I can't state it from memory. A part of it is entered on the diagram.

“Q. 12. Did they die before or after the death of Finice Caruthers?

“A. 12. I think they all died before Finice died; I think Elizabeth outlived all her brothers and sisters.

“Q. 13. Did you have any acquaintance with Alexander B. Caruthers?

“A. 13. No, only from letters; I never saw him. I corresponded with him.

“Q. 14. What was Finice Thomas' father's name?

“A. 14. I suppose it was Joseph Thomas.

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“Q. 15. Were you a subscribing witness to the deed marked ‘B,’ which I now hand you?

“A. 15. I was.

“Q. 16. Did you see the grantors named in that deed execute it, sign, and seal it?

“A. 16. I did, all of them; and I might add, I paid the money.

“Q. 17. What relation to Finice Caruthers were the respective grantors in said deed, Exhibit ‘B’?

“A. 17. The following named persons, who executed said deed, are: first cousin, Green C. Caruthers; the others are children of first cousins of Finice.”

On cross-examination:

“Question 1. How, if at all, were you interested in the estate of Finice Caruthers while on your visit to Illinois and Arkansas, spoken of by you in your direct testimony?

“Answer 1. I had an interest under a contract with Jeff. Carter and D. B. Hannah in a part of the property purchased before the time I went east as above referred to, and a half interest in all that was purchased by me for B. Goldsmith.

“Q. 2. Did you make the diagram, or furnish the facts on which it was made?

“A. 2. It was commenced (the original diagram) by Chas. W. Parrish and myself from information derived through D. B. Hannah, who had been east; and from affidavits and letters to which I have referred above. That diagram was taken east by me on the trips I referred to, and was extended and added to, as I got farther information concerning the family.

“Q. 3. How much of it was made before you went east, and how much afterward?

“A. 3. All of the first, or inner circle, was made before I went; and all of the second circle from the center, excepting, perhaps, a few dates therein; and, as near as I now recollect, from a third to a half of the third circle.

“Q. 4. Had you any other information from which to form that diagram, and on which to base the testimony you have just given, than the statement of the persons whose claims you were buying?

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“A. 4. I had their statements and some affidavits and letters that I have referred to in my direct examination; in addition, I had the statement of D. B. Hannah that he had visited other members of the same family.

“Q. 5. Do you base your supposition as to the name of Finice Caruthers, or Thomas, and of his father, upon the same grounds you have given in your last answer?

“A. 5. Only in part. I was acquainted with Finice Caruthers; I learned his name from what he said. In the land office, Elizabeth Caruthers made affidavit with reference to her name and where she was born.

“Q. 6. Did Finice Caruthers ever tell you that his name was Thomas?

“A. 6. He did not, that I recollect of.

“Q. 7. Did he ever inform you of any of the relationships you have testified to in this examination?

“A. 7. No, excepting as I heard him speak of his mother.

“Q. 8. With how many of the signers of this deed, Exhibit B, did you converse regarding their relationship to Finice Caruthers, deceased?

“A. 8. On Saturday and Sunday preceding the date of the deed, there was a two-days meeting held near Circe. On Saturday, after the meeting, I met all the persons named in that deed, made explanations in connection with what I had said to some of them before; and I think, on the Monday following, the deed was executed. If I did not talk with all personally, I talked with them all within my hearing.

“Q. 9. With how many of those persons had you talked previously?

“A. 9. With Green C. Caruthers, Jackson Caruthers, Mr. Newman and his wife, and the wives of Green C. and Jackson, and with Louisa Caruthers, William Chilcoat and his wife, Elizabeth Adcock.

“Q. 10. To whom did you pay the consideration of that deed?

“A. 10. I paid four hundred dollars of it to Green C. Caruthers; part of it to Louisa Caruthers; the balance was handed to Geo. W. Newman and Jackson Caruthers, for

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them to divide among the others, as it was not convenient to make change from the size of the bills I had. It was paid in the presence of all.

“Q. 11. What was the estimated value of the property conveyed by that deed?

“A. 11. I can't now state, as I don't remember their fractional interests; their fractional interests were not alike. It would take considerable time to make a calculation of it. I suppose the value of all the property referred to, and mentioned in the deed, was at the time \$100,000 and more.

“Q. 12. State as near as you can the proportionate share of the aggregate interest of the signers of that deed in the entire estate of Finice Caruthers, deceased?

“A. 12. It might have been one twentieth, perhaps, of the estate; this is a rough calculation.”

On redirect examination:

Question 1. What did Green C. Caruthers tell you about the family history? State it all, as near as you can.

“Answer 1. I first met Green C. at Sulphur Springs, Arkansas, in company with Jackson Caruthers and the families of both. I spent two days with them there; during that time we talked a great deal about the family. I don't remember near all he said, but I remember that he said, in substance, that he had been acquainted with Elizabeth Thomas and Finice; that he knew them in Washington county, Arkansas; that she said, and it was reputed by the family, that she came there from Dixon county, Tennessee; and that she was married to a man by the name of Thomas, whom he had never seen, and who had never been heard from by her or any of the family since she left Tennessee. He said that during the war, the fore part of the war, he was a Union man, and it wasn't safe for him to stay in that country; that he went north; that he had corresponded with this branch of the family in Waverley, Ill.; and that he went up to his relatives there and stayed with them during the most dangerous period of the war; that while there, he talked over the relationship of the family; that some of the relations at Waverley he had never seen before. He said that Samuel Caruthers and William Car-

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uthers, of Texas, and Alexander B. Caruthers, of Arkansas, were own cousins of his; that they were in sympathy with the other side; that he corresponded with them while he was north; and that since he heard of the death of Finice, and his leaving an estate in Oregon, he had taken more pains to trace and find out the relationship, and find how many were entitled to share in the estate. I then showed him the family circle before referred to, as far as it was then made up, in the presence of Jackson Caruthers and their families. He said it was correct; he added, however, that there were some members of the family in Tennessee that he did not know of until I showed him the family tree; but that he was personally acquainted with Elizabeth Caruthers, and knew, or knew of, all of her brothers and sisters. Those that he had lost the run of, were children of his cousins; he (Green C.) is a man of about sixty-eight years old."

From this testimony it appears that the witness did not derive this knowlege of the relationship of the persons of whom he speaks as relatives of Finice from any declarations made by Finice or his mother. He says on the subject of their declarations: "I was acquainted with Finice Caruthers. I learned his name from what he said. In the land office Elizabeth Caruthers made affidavit with reference to her name and where she was born." The governor then says that Finice never told him his name was Thomas, or spoke of any relatives except his mother. He does not state the contents of the mother's affidavit, as to what her name was, or where she was born; nor would such evidence been competent, for the affidavit was the best evidence of the declarations on these subjects. So there is no evidence of any declarations, coming from Finice or his mother, tending to show that their names were Thomas, or from what country they came, or where they were born, or who were their kindred. Nor is there any evidence in the case tending to show that they came from Arkansas, except that they bore the names of Elizabeth and Finice Caruthers. The only evidence tending to prove their identity with the Finice and Elizabeth Thomas, who are spoken of by Green C. Ca-

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ruthers, is that persons of that name, who were reputed as relatives, came to Arkansas from Dixon county, Tennessee. But the declarant, Green C., does not state that they left Arkansas for Oregon, or where they went. If he had stated that in a certain year, or about such a time, they had left for Oregon or the Pacific coast, or that he had heard of them or corresponded with them, it might be some evidence of identity. Or if the respondent had produced an affidavit of Elizabeth Caruthers from the land office, declaring that her true name was Thomas, or that she had been born in Tennessee, or had relatives there or in Arkansas, this, then, would have been evidence tending to show that Finice Caruthers was the same person of whom Green C. Caruthers speaks.

The declarations made to Governor Gibbs might be evidence to show that the parties who executed the deed were the kindred of the Finice and Elizabeth Thomas who came to Arkansas and who were entitled to a place in the family circle. But they could have no tendency to prove their identity with Finice and Elizabeth Caruthers, who died in Oregon, for the declarations were not in any way descriptive of the persons, except so far as the names are identical. We think this evidence is insufficient to show that the parties who signed the deed were the heirs of Finice Caruthers. Respondent claims that the evidence in this case is as full and conclusive as in the case of *Jackson v. Cooley*, 8 Johns. 127. In that case the witness testified that he was acquainted with William Wilson, the ancestor, when he resided in New York. That he removed from this country to England prior to the year 1783. That he was his agent, after he left, for managing the land in controversy. That he understood that he died, leaving no children, brother, or sister, and that John Wilson was his only nephew and heir-at-law. That after the death of William Wilson, John Wilson represented himself as heir, and witness was his agent in relation to the lands in question, and that he always understood, from the acquaintances of the family and people who claimed an interest in the lands, that John Wilson was both devisee and heir. Witness in that case also stated that his in-

Opinion of the Court—Boise, J.

formation was derived from the several powers of attorney he received, and correspondence with the parties, and conversations with Banjer Corp, and other acquaintances of the family. The question in that case seems not to have been one of identity, but rather who of the Wilson family survived. In that case the witness testified of the declarations of those who knew the family, both the ancestor and the one who claimed as heir. In this case there are no declarants referred to who pretend in their declarations to have known Finice Caruthers in Oregon, or that he was the same person who, many years before, had been in Arkansas. The cases are not parallel.

Declarations of a deceased person or persons out of the state, who are related to a family, may be admitted to prove pedigree. But before such declarations can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations. (Wharton's Evidence, c. 4, sec. 218.) And there is no other evidence adduced in this case to show that Green C. Caruthers was a relation of Finice Caruthers than as above stated. Governor Gibbs in his testimony speaks of deriving a part of his information as to this relationship from D. B. Hannah. But Hannah was not a relative or acquaintance of the Caruthers family, except as he had been in Arkansas and elsewhere to hunt them up, and gather evidence of such relationship. If he had found such evidence, it should have been produced, for an agent can not go forth to hunt an heir to a large estate, and when he has found the supposed heir, and evidence enough to convince them of the genuineness of the relationship, come before a court and on his oral testimony, without producing the evidence which has convinced him, establish the pedigree. The whole testimony in this case amounts to simply this; that Governor Gibbs, in his correspondence, travels, and searches, has found enough evidence to convince him that these persons who signed the deed are the relatives of Finice Caruthers. But his opinion on this subject is not sufficient. The opinion of the witness is not evidence; we must go behind

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the opinion and look at the facts and judge for ourselves of their weight.

We think, therefore, that there is not sufficient evidence to support the respondent's title in this suit; that it is not proved that the persons who signed this deed are the heirs of Finice Caruthers, who was the owner of the land in question at the time of his death.

**M. LICHTENSTEIN, APPELLANT, *v.* MELLIS BROS.,
RESPONDENTS.**

TRADE MARK, INFRINGEMENT OF.—L. recorded the following as a trade-mark: “I X L General Merchandise Auction Store,” and used the same as a sign over his place of business. M. afterwards used as a sign over his store: “Great I X L Auction Co.” *Held*, that the court will not suppress the use of the latter as an infringement of L.’s trade-mark.

APPEAL from Multnomah County.

This is an action for damages for violation of plaintiff's rights to a trade-mark, commenced in the circuit court and decided against appellant on demurrer to the amended complaint. The complaint shows, by proper allegations, that the plaintiffs have the exclusive right to use as a trade-mark the name “I X L General Merchandise Auction Store,’ and that the respondents, knowing the fact, fraudulently, and for the purpose of deceiving the public, use the name “Great I X L Auction Company.” The court below sustained the demurrer to the complaint, upon the ground that the facts stated did not show an infringement of the plaintiff's trademark.

O. P. Mason and E. T. Howes, for appellant.

Johnson, McCown and Macrum, for respondents.

By the Court, BOISE, J.:

It is conceded that the first ground of demurrer, to wit, that the court has not jurisdiction of the case, is not tenable; and the appellants now rely on the second ground of demurrer, to wit, that the complaint does not state facts sufficient to constitute a cause of action. In determining

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this cause of demurrer, we will first consider the matter as to whether or not the letters and words "I X L General Merchandise Auction Store," which constitute the trade-mark of the plaintiff, are so nearly identical with or similar to the words and letters used by defendants, to wit, "Great I X L Auction Co.," as to be likely to mislead the public, and cause the one to be taken for the other, and thereby draw the customers of the appellant to the store of the respondents, and thereby injure the business of the appellant. We do not think the letters and words used by the parties are so nearly identical in appearance or meaning as to mislead the public. The words used by the appellant, "General Merchandise Auction Store," suggest that the store contains a general assortment of merchandise, and that goods are there sold at auction. The words "Great Auction Co." would suggest that the Co. sold goods and other property, such as lands and such other things as are embraced under the head of general merchandise. All the words are different in these respective signs except the word *auction*, and this is a word that is generally used over all places where auctions are conducted, and can not be appropriated by any one as a trade-mark without being used with other words.

It is claimed that the letters "I X L" could not be used by the respondent after being appropriated by the appellant. These letters have been used by many manufacturers to denote their wares, as on cutlery and on bitters, and were not the invention of the plaintiffs, but taken by them from former proprietors and inventors thereof, and do not by themselves make a trade-mark any more than the word *excelsior*, which is often used with other words to make a trade-mark or sign. And in this case, the appellants have recorded all the words above with these letters as their trade-mark, and can not now claim these letters alone constitute it. We think the signs of the parties are not sufficiently similar to warrant the court in interfering to restrain the respondents, or to entitle the appellant to damage.

The judgment of the circuit court will be affirmed, with costs.

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L. BOIRE AND ADILE BOIRE, RESPONDENTS, v. CHAS. McGINN AND ANNIE McGINN, APPELLANTS.

PARTNERSHIP BUSINESS, PROFITS OF, HOW DETERMINED.—A referee appointed to ascertain and state an account between partners should ascertain what the real and actual profits were, and not what they ought or might have been.

ITEM—EXPERT TESTIMONY NOT ADMISSIBLE.—Where the books of a partnership fail to show the true state of its business, resort may be had to a calculation of the profits from the amount of merchandise proven to have been sold by said firm at the rate per cent. profit proven to have been made on said merchandise in that particular business, but not to expert testimony of witnesses engaged in a similar business, to prove that profit was made by this firm in their business, for the purpose of charging one of the partners therewith.

ITEM—ENTRIES IN PARTNERSHIP BOOKS, EFFECT OF.—In stating the accounts of partners, as between themselves, the rule is that the entries on the partnership books, to which both partners have had access at the time when those entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries; subject, however, to the right of either party to show a mistake or error in the charge or credit.

APPEAL from Multnomah County. The facts are stated in the opinion.

H. B. Nicholas, for appellants.

W. H. Effinger and J. R. Stoddard, for respondents.

By the Court, PRIM, J.:

This is a suit in equity to dissolve a partnership and settle up its business. It appears that on April 9, 1877, the plaintiff L. Boire and Charles McGinn formed a partnership for the purpose of carrying on the bakery and retail grocery business in the city of Portland. That at the commencement of said business its capital stock consisted of machinery and utensils for carrying on said business, and a small stock of groceries estimated at five hundred dollars, amounting in all to two thousand four hundred dollars, and that each owned one half interest therein. That afterwards, on May, 1877, they purchased a house and lease of lot from one Winter for one thousand and fifty dollars, into which

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they then moved and continued to carry on their said business until the thirteenth day of June, 1877. At the date last mentioned, defendant McGinn owning an individual debt to some one, and fearing that proceedings would be taken against him to collect the same, a pretended dissolution was entered into, which arrangement proved to be void and of no effect. The case was referred to O. P. Mason, Esq., to take the testimony and state the account between the parties, and report the same to the court.

The referee having taken the testimony, among others, reported the following findings of fact and conclusions of law:

"6. That from June 13 to December 14, following, Boire had the exclusive control of the entire business, the purchase of merchandise, the payment of debts, the handling of all cash, and the keeping of the books, and that most of the time McGinn was not about the place of business at all, but sick; that during that time, the upper story of the building was rented and Boire received the rent therefor. 7. That the books of the concern are incomplete, imperfectly kept, and do not show a full history of the businesss during said period; do not show the amount of merchandise sold, the amount of cash sales, nor the amount of profit and loss, nor the correct account of the individual partners. 10. That nine tenths of the sales were baked stuffs and one tenth groceries and other merchandise; that the gross profit on baked stuffs averaged one hundred per cent., and on groceries and other merchandise, twenty-five per cent.; that after making deductions for what was used in their families, the profits on all sales averaged seventy-five per cent., and that such profits would be five thousand eight hundred and seventy dollars and thirty-two cents, from which expenses and losses are to be deducted."

The seventeenth finding charged "Boire with eight months' rent of up stairs, and McGinn fifteen months, at twenty dollars—which, added to the profits named in the tenth finding, makes a total of six thousand three hundred and thirty dollars and thirty-two cents; and after deducting loss and expense, leaves a net profit of two thousand five

Opinion of the Court—Prim, J.

hundred and eighty-nine dollars and fifty-seven cents to be divided between the two parties. 18. That while the said business was paying a profit, Boire having the management and control, allowed an indebtedness of six hundred and forty-one dollars and ninety-six cents to accumulate, and McGinn is entitled to receive one half of that sum from Boire."

As conclusions of law: That "1. Where the books of a firm do not show the true state of the business, resort may be had to a calculation of the profits from the amount of merchandise sold, at the per cent. of profit proved in such business to be made on such merchandise. 2. Where one partner has full charge of the business, control of the cash and books, and buying and selling, and his books are kept so imperfectly and incorrect that an accounting can not be had therefrom, he is charged with the amount of profits proved to have been made on such business generally, and his books are to be taken in evidence only so far as they prove themselves to be correct. 3. The presumption of law is, that the books contain a full history of the business; but when it has been proven or admitted that the books are incomplete and incorrect, resort may be had to the next best evidence for an adjustment of accounts between the partners; and that books may be aided, explained, or impeached by other evidence. 4. The burden of proof is on the plaintiff; and when a certain amount of profits has been proved, he is charged therewith, unless he can show that the expense and losses have equaled the profits. It is not sufficient for him to say that there have been losses; it devolves on him to show the losses, and how and where they are."

The above findings, together with some others not herein set out, having been excepted to, were set aside by the court upon the final hearing of the cause, as being against the evidence and law applicable to the case.

The court then finds and holds that said parties were partners in said business, from the organization of said partnership up to the present time, and that the books were kept by the firm, or by its employes, and under the inspec-

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tion of both parties; also that a computation of profits in said business, based upon the percentage usually realized in such business by other parties, and upon the amount of flour used each day, the number of bucketfuls of water used in mixing it, the aggregate number of loaves produced and the profits made on each, is unsafe; and that since the books of the partnership kept by the employes, under the inspection of both parties, do not show any profits, the court will not presume any more made over and above what the partners drew, and what remains in uncollected bills, in which both parties are entitled to share alike; and since said books do not charge Boire with having received any profits, a court of equity will not so charge him, unless satisfactorily shown by sufficient evidence, and it will not be sufficient to show that the business ought to have been profitable, and conclude from that fact that it was profitable, and that Boire got the profits, or that McGinn took, by the same reasoning, profits while he held exclusive possession; nor will it be sufficient to compute the net profits from the amount and cost of material, labor, etc., used, and the price for which it sold when manufactured; nor can McGinn be construed to be so far absent from said business as to hold Boire liable as a trustee. Also, that said matters in relation to the renting of rooms and indebtedness, were partnership matters, and should be treated as such.

These conclusions and findings of fact and law by the court, in our opinion, are correct, and are supported by the evidence produced in the case and the law applicable thereto. It was the duty of the referee to ascertain and report what the real and actual profits of this partnership were, and not what they ought or might have been.

It appears that both parties were in Portland all the time when the business was carried on, and were not deprived of the opportunity of looking into the books whenever they desired to do so; consequently, one can not be held to be the special agent and trustee of the other, so as to charge him with profits, whether any were realized or not.

Where the books of a partnership fail to show the true state of its business, while resort may be had to a calcula-

Statement of Facts.

tion of the profits from the amount of merchandise proven to have been sold by said firm at the rate of per cent. profit proven to have been made on said merchandise in that particular business, resort can not be had to *expert* testimony of witnesses engaged in a similar business, to prove what profit was made by this firm in their business, for the purpose of charging one of the partners therewith, in a settlement of their accounts. "In stating the accounts of partners, as between themselves, the rule is that the entries on the partnership books, to which both partners have had access at the time when those entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries, subject, however, to the right of either party to show a mistake or error in the charge or credit." (*Heart v. Corning*, 3 Paige's Ch. 566.)

The decree of the court below is affirmed.

8 470
10 116
14 380
14 382
12^o 735
12^o 736

THOMAS MOUNTAIN, RESPONDENT, *v.* THE COUNTY OF MULTNOMAH, APPELLANT.

COUNTY COURT—WRIT OF REVIEW LIES TO CORRECT ERRORS OF, IN COUNTY BUSINESS.—Under section 875 of the code, no appeal lies from the decisions of the county court in the transaction of county business, but such decisions may be reviewed upon writ of review.

ITEM—MILITIA COMPANIES—DUTY OF COUNTY COURT TO PROVIDE ARMORY.—It is the duty of the county court of each county in which there shall be an organized volunteer company, upon application to the commanding officer thereof, to provide an armory and armorer, and to audit, allow, and cause to be paid the necessary expense of the same to an amount not exceeding fifty dollars per month; and if the county court shall refuse so to do, its proceedings may be reviewed, by writ of review, as provided for in the code.

APPEAL from Multnomah County.

In May, 1872, the Portland Light Battery was organized in Multnomah county, according to the laws of the state of Oregon, and was listed in the office of the adjutant general of the state, and became, and has continued ever since, a part of the organized militia of the state. Thomas Mountain aforesaid was elected and duly commissioned captain,

Statement of Facts.

and as such, gave the necessary bonds required by statute. He has been ever since, and is now, such captain, duly qualified and commissioned according to law. The said battery is a sectional one, having two guns or cannons without caissons, that being the total amount of ordnance belonging to the state of Oregon. From the time of its organization until the first day of July, 1879, the county court of Multnomah county has paid to Mountain, as Captain of said battery, the sum of fifty dollars monthly, that being the limit imposed by law to be allowed such an organization for monthly necessary expenses. Since that time nothing has been paid. In October, 1879, Mountain petitioned said county court to allow the necessary expenses of the said battery for July, August, and September, alleging that they were forty-one dollars and fifty cents for each of said months, itemized as follows: Thirty dollars for rent of armory; ten dollars, pay of armorer; and one dollar and fifty cent for lights; total, one hundred and forty-one dollars and fifty cents. In his petition he set out at length the above facts, and duly verified them by affidavit. The county court, after hearing the petition, made an order disallowing all of said account. Whereupon, Mountain brought a writ of review to the circuit court, alleging as grounds of error: That there was no other evidence before the court than said petition, and there was no controversy or dispute about the matters and things set forth in said petition; that said court had no jurisdiction to disallow said petition, for the reason that it is the duty of said county court to audit, and allow, and cause to be paid the necessary expenses of a duly organized volunteer company of the state; and that said court refused to audit and allow, or cause to be paid, the necessary expenses, and without cause disallowed the same. A motion was made on behalf of the county court to dismiss the writ of review for want of jurisdiction, which was denied.

After argument, the circuit court made an order finding "that the Portland Light Battery is a duly organized volunteer company; that its necessary expenses for an armory and armorer for and during the months of July,

Argument for Respondent.

August and September, 1879, are one hundred and forty-one dollars and fifty cents, and that it is entitled to said sum, and ordered that the county court allow the same." From which judgment and allowance the county court appeals to this court.

J. F. Caples, District Attorney, and M. F. Mulkey, for appellant:

The county commissioners are the financial agents authorized to audit claims against the county, and when the plaintiff made his demand by presenting his petition, and the same was refused and rejected, the plaintiff had his right of action. The plaintiff did not have any right of appeal, as the county commissioners were only exercising functions of a non-judicial character. (5 Or. 273, and cases cited.) The party asking a writ of review must be concluded by the action of the inferior court or tribunal before it will lie. (Id. 280.) In this case, by the refusal of the county commissioners to audit or allow the claim of the petitioner, he was not concluded in any sense, as his right of action remained intact and the action of the county commissioners amounted to nothing more than a refusal to pay upon demand, and it left the plaintiff really in a better condition to pursue his plain remedy by an action in the proper form.

Fred. V. Holman, for respondent:

"From the necessity of the case, supervisors exercise judicial, legislative, and executive powers in matters relating to the police and fiscal regulations of counties." (8 Cal. 61; 14 Id. 479.) A board of supervisors of a county, in allowing or disallowing a claim, exercise judicial functions." "A writ of mandate [mandamus] will not be issued to reverse or review its judgment." (16 Cal. 209; 41 Id. 68; *People v. Supervisors*, 51 N. Y. 444; Gen. Laws of Oregon, p. 284, sec. 875; *Chase v. B. Canal Co.* 10 Pick. 244; *Stone v. Mayor of N. Y.*, 25 Wend. 167; *M. I. Co. v. Schubal*, 29 Wis. 444.)

Opinion of the Court—Prim, J.

By the Court, PRIM, J.:

The first and second assignments of error are not well taken, and are therefore overruled, as it appears there was no dispute as to facts found by the court. The facts found by the court, to which exceptions are taken, were as follows, to wit: 1. That the Portland Light Battery was a duly organized volunteer company. 2. That its necessary expenses for an armory and armorer for and during the months of July, August, and September, 1879, were one hundred and twenty-one dollars and fifty cents. These facts are fully set out in the petition of Captain Mountain and duly verified by him; Mountain was captain of the company and had charge of the battery, and consequently had personal knowledge of the facts set out in the petition.

The petition was the only evidence before the county court, and it appears there was no controversy or dispute about matters and things set out therein. It appears that the county court, after hearing the petition, made an order disallowing the whole of said account. This being an order made by the county court in the transaction of county business, there was no remedy by appeal. Sec. 875 of the code provides that "the provisions of title 4, of chapter 6, relating to appeals," do not apply to the decisions of the county court "given or made in the transaction of county business," but that in said matters the "decisions of the court shall *only* be reviewed upon the writ of review provided by this code."

Section 19, Misc. Laws, page 668, provides as follows: "It shall be the duty of the county court of each county in which there shall be one or more organized volunteer companies, upon application of the commanding officer of the same, to provide for each company in said county an armory, safe and suitable for the drill of squads in the school of the soldier; and an armorer, to take charge of the same; and said court shall also, at each of its sessions, audit and allow, and cause to be paid, the necessary expenses of the same; *provided*, That the total amount for all the pur-

Points decided.

poses above mentioned shall not exceed fifty dollars in money per month for each company."

It will be seen that by the provisions of this section it is made the special duty of the county courts to audit, allow, and cause to be paid, the necessary expenses of organized volunteer companies within their respective counties. And as the county courts, as a matter of necessity, in allowing or disallowing these accounts, have to exercise judicial functions, their action may be reviewed by the writ of review provided for in the code. (*Tilden v. Sacramento County*, 41 Cal. 68; *People ex rel. v. Supervisors of Madison County*, 51 N. Y. 442; *El Dorado County v. Elstner*, 18 Cal. 148.)

There being no error in the judgment of the circuit court, it is affirmed.

8	474
9	316
11	225
4*	330
8	474
29	380

ARTHUR FAHIE, PLAINTIFF AND RESPONDENT, *v.* S. A. LINDSAY, APPELLANT, AND A. B. LINDSAY, F. W. GODFREY, B. LATHAM, JAMES WILSON, DENNIS CORCORAN AND FISHBURN & KENNEDY, DEFENDANTS AND RESPONDENTS.

BILL OF INTERPLEADER.—An action was brought in the county court by a husband and wife against the maker of a promissory note payable to the wife, and while the action was pending, the money due upon the note was garnished in the hands of the maker by certain creditors of the husband, who claimed that the same was the property of the husband, and who alleged that the note was taken in the wife's name to delay and defraud the husband's creditors. *Held*, that the maker of the note could properly file a bill of interpleader to determine the conflicting claims of the wife and the garnishing creditors to the money.

IDEM—MATTERS AFFECTING THE GOOD FAITH OF THE PLAINTIFF ARE NOT ADMISSIBLE AFTER THE ORDER IS MADE.—Where the plaintiff in a bill of interpleader stated under oath that there was no collusion between himself and either of the defendants, and an order was made by the court requiring the defendants to interplead with each other, evidence to prove collusion could not be received after the making of such order.

FINDINGS OF FACT BY REFEREE—WHAT EFFECT GIVEN THEM.—In a suit in equity, where the court appoints a referee to take the testimony and report the facts and the law to the court, this court will not reverse the findings of facts by the referee unless the same are clearly against the weight of the testimony.

APPEAL from Multnomah County.

Statement of Facts.

On the tenth day of October, 1878, the respondent executed and delivered to the appellant a promissory note, of which the following is a copy:

“\$300. Thirty days after date, for value received, I promise to pay S. A. Lindsay or bearer the sum of three hundred dollars, in U. S. gold coin, and one per cent. until paid.

“Portland, October 10, 1878. ARTHUR FAHIE.”

On the twentieth day of November, 1878, the defendant, A. B. Lindsay, and the appellant, S. A. Lindsay, his wife, commenced an action in the county court against the respondent, on the said promissory note, and before judgment was obtained in the action, to wit, on and between the twentieth and twenty-seventh days of November, 1878, the defendants, Godfrey, Latham, Corcoran, Wilson, Fishburn, and Kennedy, severally caused garnishee process to be served on the respondent, Arthur Fahie, by virtue of sundry executions issued by them respectively on judgments which they had obtained in justices' courts against the defendant, A. B. Lindsay, and one Brandstetter. These defendants, who garnisheed the respondent, claimed that the money due on the three hundred dollar note in controversy belonged to the defendant, A. B. Lindsay, and not to his wife, S. A. Lindsay, the appellant, and that the note was made payable to her with intent to defraud the creditors of A. B. Lindsay. On the fourth day of December, 1878, the respondent commenced a suit in the circuit court by filing a bill of interpleader, making A. B. Lindsay, S. A. Lindsay, and all the garnishee claimants parties defendants in the suit.

In the complaint, the respondent alleges that he made and delivered the note in controversy to S. A. Lindsay on the tenth of October, 1878; that an action was commenced on it by A. B. Lindsay and S. A. Lindsay, in the county court, against the respondent; that afterwards the defendants Godfrey, Latham, Corcoran, and others caused notice of garnishment to be served on him (respondent) by virtue of executions issued upon judgments rendered in their favor

Opinion of the Court—Kelly, C. J.

in justices' courts against A. B. Lindsay and others; that said defendants claim that the money due on the said promissory note is the property of A. B. Lindsay, and was made in the name of S. A. Lindsay, the wife of A. B. Lindsay, with intent to cheat and defraud his creditors. The respondent then alleges that he is wholly ignorant of the respective rights of said several defendants to the money due on the note, and prays that said defendants may be required to interplead between themselves concerning their claims to the money.

After the pleadings between the several claimants were perfected, and the case at issue, William M. Evans was appointed a referee, to take the testimony and report the facts and the law to the court. In his report the referee, among other things, finds, "that said note was made by said Arthur Fahie to said S. A. Lindsay, for the purpose of hindering, delaying, and defrauding the creditors of said A. B. Lindsay; and that the money secured by said note was his property." The report of the referee was confirmed, and the money adjudged to belong to the creditors of A. B. Lindsay, who had garnisheed it in the hands of respondent.

B. Killen and H. B. Nicholas, for appellant.

Northup & Gilbert, for respondents Fishburn and Kennedy.

Yocum & Clarno, for respondent Fahie.

By the Court, KELLY, C. J.:

The first question raised by the appellant is one of jurisdiction. He claims that the matters in controversy between the several parties in this suit were not the proper subject of interpleader. Judge Story says: "A bill of interpleader is ordinarily exhibited where two or more persons claim the same debt, or duty, or thing from the plaintiff by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty, or other thing, fears that he may suffer injury from their conflicting claims, and therefore he prays that they

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may be compelled to interplead, and state their several claims, so that the court may adjudge to whom the same debt, duty, or other thing belongs." (Story's *Eq. Pl.*, sec. 291; *Daniell's Ch. Pl. and Pr.* 1560.)

We think the subject-matters in controversy in this suit come clearly within this rule, laid down in the books on equity pleading. The respondent admitted that he was indebted in the sum of three hundred dollars on the note given by him. Apparently the debt was due to S. A. Lindsay, the appellant, and it was claimed by her. This claim or right was denied by the creditors of her husband, who had garnisheed the debt in the hands of respondent. They alleged that there was collusion between the husband and wife to hinder, delay, and defraud them by taking the note in the name of the wife, when, in fact, the amount specified in it belonged to the husband. To try and determine this question of alleged fraud was within the peculiar province of a court of equity. A court of law had no jurisdiction of it, and the county court, in which the action on the promissory note was pending, had no equity jurisdiction conferred upon it by law to try questions of fraud.

The appellant contends that the respondent ought to have made the defense to the action, if any he had, in the county court, and that having failed to do so, he should not now be permitted to come into a court of equity for relief. But it is difficult to perceive what defense he could have made in the county court to the action against him, as he did not deny the validity of the note on which the action was brought. On the contrary, he averred his readiness to pay the amount due on it, to whomsoever it should be adjudged to belong. And that was a matter which could not be tried there, as the determination of it was cognizable only in a court having equity jurisdiction. Those who had garnisheed the money due on the promissory note, claiming that it was the property of A. B. Lindsay, had a right to establish their claim to it as against the appellant, but they could not interpose this defense in the action against the respondent in the county court. And the fact that the appellant obtained a judgment in her favor in that court after the garnishee

Opinion of the Court—Kelly, C. J.

notices were served on the respondent, can not destroy their right to contest the validity of her claim to it. And we hold that the proper way to settle and adjust these conflicting claims to the money was by a bill of interpleader.

It is also claimed by the appellant that she should have been allowed to prove that there was collusion between the respondent and the defendants, who garnisheed the money on the note. There was an averment in the complaint that the suit was not brought by collusion with either of the defendants. The appellant demurred to the complaint, and the demurrer having been overruled, she did not ask leave to answer before the order of interpleader was made by the court. We think it was then too late to raise any question of collusion between the respondent and any of the defendants. Under the old system of equity practice, when the bill was not required to be sworn to, the plaintiff was required to file, with a bill of interpleader, an affidavit that there was no collusion between himself and any of the other parties to the suit; but the court would not permit any evidence to be adduced to contradict the affidavit. (2 Daniel's Ch. Pl. & Pr. 1508.)

There is another reason why this point can not be considered here. The report of the referee is silent upon the question whether there was or was not any collusion between the respondent and any of the defendants, and no exception was taken to it on this account, and as this ground of defense was not taken in the court below, it can not be made here for the first time.

The other points relied upon for a reversal of the decree of the circuit court are mainly questions of fact, as to whether the promissory note was taken in the name of the appellant for the purpose of defrauding the creditors of her husband, and whether the claims of the defendants, who garnisheed the money due on the note, were just and legal demands against the defendant, A. B. Lindsay. These were controverted and contested matters before the referee, upon which a great deal of testimony was taken on both sides. And after hearing it, the referee found, on all these questions, adversely to the appellant.

Opinion of the Court—Kelly, C. J.

Exceptions were taken by her to the findings of fact in this respect, and the exceptions were not sustained by the court. In such cases this court will not reverse a decree, unless the findings of the referee are clearly against the weight of testimony, which we think is not so in this case.

The decree of the court below is affirmed with costs.



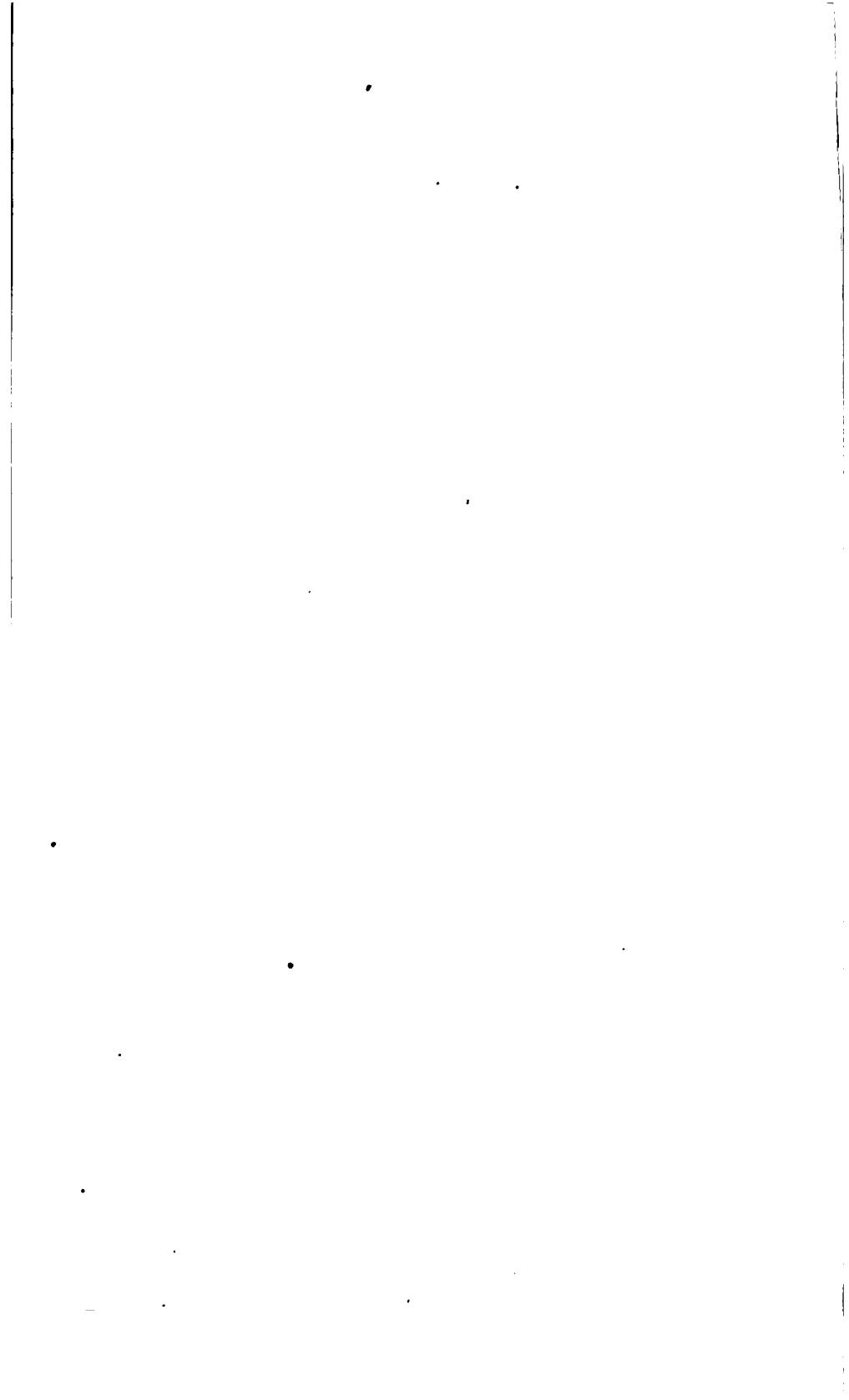
JULY TERM, 1880.



JUSTICES
OF
THE SUPREME COURT

WM. P. LORD (Chief Justice).
E. B. WATSON,
JNO. B. WALDO.

T. B. O'DNEAL, Clerk.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JULY TERM, 1880.

THE STATE OF OREGON, EX REL. J. H. MAHONEY,
RESPONDENT, *v.* J. D. MCKINNON, ALVA PIKE,
JOHN H. SHUPE, E. J. PAGE, AND GEORGE
SACRY, APPELLANTS.

THE DISMISSAL OF AN APPEAL by order of the appellate court, for defects in the undertaking of appeal itself, does not operate as an affirmance of the judgment appealed from.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman and Ball, for appellant.

Wm. R. Willis, for respondent.

By the Court, WATSON, J.:

The respondent has filed a motion to dismiss the appeal in this case, upon the ground of a former appeal having been taken from the same judgment, and dismissed at a previous term of this court. The record shows that this former appeal was dismissed on motion of the respondent, at the last January term, for defects in the undertaking, while appellants were present by their counsel, prosecuting the appeal, and after their request to file a sufficient undertaking made on the hearing of the motion to dismiss had been denied by the court. The respondent contends that upon this state of facts, there was an abandonment of the appeal, and that the order of dismissal operated as an affirmance of the judgment appealed from. We think otherwise.

8	485
11	287
3*	383
8	485
23	537
32*	402
8	485
134	375

Opinion of the Court—Watson, J.

The appeal had not been perfected by the filing of an undertaking conforming to the requirements of the statute regulating the mode of taking appeals to this court, and the court had not acquired sufficient jurisdiction of the case to proceed and try it upon its merits, and render a final decision, either affirming, modifying, or reversing the judgment appealed from; and this degree of jurisdiction we hold to be essential to give the mere order of dismissal the effect of affirming the judgment appealed from, and terminating the appeal.

The appeal is perfected by filing an undertaking therefor conforming to the statute, within the time fixed in the statute, or such further time as may be allowed by the court. (Code, secs. 527, 528.) Until thus perfected, the appeal is wholly ineffectual. (*Canyon Road Company v. Lawrence*, 3 Or., 519.) The appeal must be perfected, and the transcript filed within the time allowed by law, before the appellate court has any jurisdiction of the cause. (Code, sec. 531.)

The appellate court, upon an attempted appeal as defective as this one was, had no other jurisdiction over the case than to dismiss it without affirming the judgment or decision appealed from. (*Fassman v. Baumgartner*, 3 Or. 469, *Long v. Sharp*, 5 Or. 442.)

We have examined the authorities cited by the respondent carefully, and find no case among them where it has been held that an order dismissing an appeal for jurisdictional defects, amounted to an affirmance of the judgment appealed from, and terminated a party's right to take another appeal within the time fixed by law. They seem to have been cases where the appeal had been perfected, and jurisdiction acquired by the appellate court, but their prosecution had been abandoned by appellants. (*Simpson v. Prayther*, 5 Or. 86, and cases there cited.)

Such being the view entertained by the court, the motion to dismiss will be denied.

Opinion of the Court—Watson, J.

**THE STATE OF OREGON, EX REL. J. H. MAHONEY,
RESPONDENT, *v.* J. D. MCKINNON, E. J. PAGE, J.
H. SHUPE, AND GEORGE R. SACRY, APPELLANTS.**

NOTICE OF APPEAL—ERROR NOT ASSIGNED.—No error not specifically assigned in the notice of appeal will be considered; but the court will take judicial notice of the lack of jurisdiction in the court below, appearing on the face of the record.

IDEM.—A statement in the notice that “the decision and judgment are against law,” is not specific under the statute, and should be disregarded.

PROCEEDING FOR CONTEMPT—AFFIDAVIT MERELY EVIDENCE.—A counter affidavit filed in a proceeding for contempt, is not a “pleading,” but evidence merely, and the facts stated in it may be rebutted by other evidence without a formal replication.

IDEM—QUESTIONS OF FACT NOT EXAMINED ON APPEAL.—The question upon the hearing of a rule to show cause, as well as the question on the trial of a proceeding for contempt, are those of fact merely, to be determined on all the evidence taken by the court below, and this court will not disturb such determination, unless for errors of law or want of jurisdiction appearing upon the transcript.

IDEM—JURISDICTION ONLY EXERCISED DURING TERM.—The judge of the circuit court, in vacation, has no power to hear and determine charges of contempt for disobeying judgments or orders of court. The exclusive jurisdiction over such charges belongs to the court whose judgments or orders have been disobeyed, and can only be exercised during term.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman and Ball, for appellant.

Wm. R. Willis, for respondents.

By the Court, WATSON, J.:

It appears from the transcript that this was a proceeding for contempt, under tit. 4, of chap. 7, of the Civil Code, based upon the following affidavit and motion:

“In the circuit court for the county of Douglas, State of Oregon.

“STATE OF OREGON, ex. rel. J. W. Mahoney, Plaintiff, *v.* J. D. MCKINNON, ALVA PIKE, J. H. SHUPE, E. J. PAGE, and GEO. R. SACRY, defendants.

“Action at law to prevent the usurpation of office.

8	487
17	317
32	63
21*	60
29*	78
8	487
23	463
32*	302
8	487
37	600
8	487
47	619

Opinion of the Court—Watson, J.

“State of Oregon, County of Douglas, ss.:

“I, William R. Willis, being duly sworn, say I am attorney for plaintiff above named; that said plaintiff did, on the twenty-fifth day of June, 1879, recover judgment in the above entitled court and cause against the said defendants, J. H. Shupe, E. J. Page, and George R. Sacry; that they were guilty of usurping and unlawfully exercising the office of trustees of the city of Oakland, and that they be excluded therefrom; that I am informed and believe that the said defendants, E. J. Page and John H. Shupe, in disobedience of said lawful judgment, continue to and do now usurp and exercise the office of trustees of said city of Oakland, and refusing and neglecting obedience to said judgment.

WILLIAM R. WILLIS.

“Subscribed and sworn to before me, August 26, 1879.

“T. R. SHERIDAN, Clerk.

“Now comes the plaintiff above named, and moves the Hon. J. F. Watson, judge of the above-entitled court, upon the foregoing affidavit, for a warrant of arrest against the said defendants, E. J. Page and John H. Shupe, to answer for contempt in neglecting and refusing to obey said judgment.

W. R. WILLIS, Plaintiff's Attorney.”

Upon this affidavit and motion, the judge of the circuit court made an order, requiring said Page and Shupe to appear on September 4, 1879, and show cause why they should not be arrested to answer said charge of contempt.

At said date they appeared and filed a counter-affidavit, denying any violation of the judgment described in the affidavit of Willis, and any intentional contempt of the court, and setting up an alleged legal title or right to exercise the office of trustees of the city of Oakland, acquired subsequent to the rendition of the judgment of exclusion above referred to. This showing was held insufficient, and on September 16, 1879, said judge made an order that a warrant for the arrest of said defendants be issued, returnable on the nineteenth day of the same month.

At said date, said proceeding was finally heard and determined. Defendants Shupe and Page were adjudged

Opinion of the Court—Watson, J.

guilty of contempt of court, as charged, and fined one dollar each, and ordered to pay the costs and disbursements of the proceeding. And the said defendants Shupe and Page appealed, and in their notice of appeal assign the following errors:

1. That the decision and judgment are against law.
2. That the decision and judgment of the court are against the facts admitted in the pleadings, and are contrary to law.
3. That the court erred in its order made on the twenty-seventh day of August, 1879, on the defendants to show cause why a warrant should not be issued to arrest them to answer said charge, for the reason that the affidavit of Wm. R. Willis, and the motion of plaintiffs filed therewith, designed as the complaint in said proceeding, is insufficient to give the court jurisdiction to make the said order.
4. The court erred in its order for a warrant of arrest against the said appellants, made and entered on the sixteenth day of September, 1879, to answer said charge, for the reason that the answer and affidavit of the appellants, filed in said proceeding on the fifth day of September, 1879, is in all things a sufficient showing that said defendants (appellants) were not acting in contempt of the previous decision and judgment of said circuit court, in exercising the office of trustees of the city of Oakland, but under and in pursuance of an allotting and certificate of election, had and issued by the inspectors of said election, under and in pursuance of and according to the written opinion of said circuit court, made and filed with its decision, in the said action, according to the statute in such cases made and provided.

Section 527 of the Civil Code, which provides what a notice of appeal shall contain, declares that such notice shall state that the appellant appeals from the judgment or decree of the circuit court, or some specified part thereof, and in case the judgment be one rendered in an action at law, shall specify the grounds of error, with reasonable certainty, upon which the appellant intends to rely upon the appeal.

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It is plain that the first assignment in the notice does not comply with this requirement of the statute. It is too vague and general to notify the respondent of the particular issues to be tried on appeal, and thus afford him proper guidance in the preparation of his defense.

If one objection can be urged against the judgment appealed from under an assignment of error so general and indefinite as this one is, then all objections can be made under it, and the requirements of the statute be wholly disregarded. But neither reason nor authority leads in this direction. On the contrary, wherever a statute has provided for a specific assignment of grounds of error on appeal, it has been held necessary to comply with such requirement. (*Derby v. Hannin*, 15 How. Pr. 32; *Christman v. Posh*, 16 Id. 17; 25 Cal. 478; 30 Cal. 509; *Dolph v. Nickum*, 2 Or. 202; *Rickey v. Ford*, Id. 251.)

We can not regard this assignment, because it does not specify any particular ground of error upon which appellants intend to rely on this appeal.

The second ground of error assigned in the notice is upon a supposed admission in the "pleadings," by which we understand is meant the affidavit and counter affidavit before referred to; but these are not "pleadings" in the proper sense of the term, and the ordinary rules of law governing the construction of pleadings in an action at law are not applicable.

The counter affidavit was nothing more than evidence offered by defendants to rebut or explain away the charge of contempt, on the hearing of the order to show cause, and was in no sense a pleading.

It was a question of fact whether they made a sufficient showing of cause upon said hearing or not, in view of all the evidence produced on that occasion, and the decision thereon, unaffected by any error of law, would not in any case be appealable to this court; but this ruling or decision was not the final judgment in the proceeding from which an appeal is given by the statute, or from which this appeal was in fact taken.

It was a mere preliminary to issuing the warrant to arrest

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the defendants to answer said charge, and the trial and final judgment upon the hearing was had on the nineteenth day of September, 1879, and could not have been affected by such preliminary decision.

The third ground of error is not well taken. The affidavit of Mr. Willis, we think, sufficiently shows the facts constituting the contempt, and any person having knowledge of the facts is competent to make the affidavit under section 643 of the Civil Code. Whether Willis should be deemed the relator or Mahoney, is wholly immaterial, so far as the jurisdiction of the court is concerned, to make the order on defendants to show cause.

The fourth ground of error assigned in the notice of appeal rests upon the proposition that the counter-affidavit of defendants filed September 5, 1879, under the order to show cause, established a full defense to the proceeding. But as we have already stated, we do not so regard it. At most it was but evidence on the hearing of the order to show cause, and it could not be used as evidence even on the final trial, except by consent of parties, and the record does not show that it was so used; but, be that as it may, it was the duty of the court, upon the return of the warrant, under section 648 and 649, to proceed to investigate the charge by taking the evidence, and upon that evidence to determine the guilt or innocence of the parties charged, and give judgment accordingly. Obviously the counter-affidavit previously filed could only be introduced as evidence at most, upon this investigation, with any other evidence produced at that time by either party.

But the determination was one of fact, and unless some error of law, calculated to affect that determination, is shown by the record, this court will hold it like all other decisions of fact in proceedings at law, conclusive on appeal. What evidence, if any, was taken on the final trial of this proceeding in the court below, does not appear from the record, and we must conclude that it was sufficient, in legal effect, to justify the judgment.

It was urged by the counsel for the appellants on the argument here that the judge of the circuit court had no

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power to hear and determine this proceeding in vacation, although this was not assigned as error in the notice of appeal, and does not seem to have been questioned during the proceeding below.

The transcript discloses the facts that the judgment, in respect of which the disobedience is charged as a contempt, was a judgment rendered by the circuit court for Douglas county, at its May term, 1879, while the proceeding for contempt was taken wholly before the judge of the court in vacation after said term. If this was an error it goes to the jurisdiction, and as it appears from the record itself, this court is bound to take judicial notice of it, although not assigned, or not even appearing in the argument. If this want of jurisdiction appeared to the judge before whom the proceeding was had, at any stage, he should, of his own motion, have dismissed the cause, and this court, on appeal, stands in the same position. (*Hollingsworth v. The State*, 8 Ind. 258; *Heyer v. Berger*, 1 Huff. Ch. 17; *Evan v. Christian*, 4 Or. 376; *McKay v. Freeman*, 6 Or. 453.)

While every court and every judicial officer is, under our statute, invested with authority to investigate charges of contempt arising from disobedience to its or his lawful judgments, or orders, in the manner provided by the code, and punish those found guilty, it does not follow as a logical, necessary consequence that either without express statutory authority can take cognizance of such offenses against the dignity or authority of the other. Each has the power to enforce obedience to its or his own lawful judgments, or orders, in the cases and manner provided, by proceedings for contempt, but has no such power in reference to the judgments or orders of the other (except when the judge's order is made in some cause pending in the court), unless the statute expressly gives it.

Section 888 of the Civil Code declares: "A judge may exercise out of court all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise.

Title 4 of chapter 7, under which this proceeding was taken, never speaks of "a court or judge thereof," but

Argument for Appellants.

of "a court or judicial officer," and the line of separation is plainly marked throughout.

We can not find any authority given by the statute for holding a proceeding like this for contempt, in disobeying a judgment of the court, before the judge of the court, in vacation, and he had no such power at common law. (*Taylor v. Moffatt*, 2 Blackf. 305.)

In our judgment the judge who tried this proceeding below, in vacation, had no jurisdiction in the premises, and the judgment rendered by him was void.

Such judgment must be reversed, with costs, and the proceedings in the court below dismissed.

8	493
9	443
10	74
17	125
20*	319

STATE OF OREGON, EX REL. J. H. MAHONEY, RESPONDENT, *v.* J. D. MCKINNON, E. J. PAGE, J. H. SHUPE, AND GEORGE R. SACRY, APPELLANTS.

MUNICIPAL CORPORATION—BOARD OF TRUSTEES—JURISDICTION IN ELECTION CONTEST NOT EXCLUSIVE.—The provision in a city charter that the board of trustees "shall judge of the qualifications and election of their own members," does not oust the jurisdiction of the circuit court over usurpations of such office. It will still entertain an action under section 354 of the civil code against a person unlawfully exercising the office of trustee of such city, and the provision in the city charter will be held as affording merely a preliminary or cumulative tribunal.

A BALLOT WRITTEN OR PRINTED ON COLORED PAPER IS ILLEGAL, and should be rejected at any election held under the general laws of this state.

IN CASE OF A TIE THERE IS NO ELECTION.—Where, at an election held under the laws of this state, two or more candidates receive the highest and an equal number of votes for the same office, neither is elected, nor can either rightfully exercise the duties of such office until the matter has been decided by lot, and he has been declared duly elected in the manner provided in the code.

APPEAL from Douglas County. The facts are stated in the opinion.

Herman & Ball, for appellants:

In order to put the charter of the city of Oakland in successful operation, the act of incorporation has wisely provided, that the inspectors of the first election shall give

Argument for Respondents.

certificates of election to the successful candidates; and that the trustees thus elected shall judge of the qualification and election of their own members, and decide contested elections of all town officers; and their action is conclusive against this proceeding. (Session Laws 1878, 121-125; *The Commonwealth, ex rel. McCurdy, v. Leach*, 44 Penn., sec. 332; *The Commonwealth, ex rel. Yard, v. Messer*, 44 Penn., sec. 341-343.)

If the trustees under the charter are not the sole judges of the election and qualification of their own members, and the court has jurisdiction to inquire into the legality of their appointment, it will determine what was the will of the legal voters as manifest by their ballots; and the colored ballot was cast by a qualified elector and received by the inspectors without objection or protest, and it should be counted. (Cooley's Const. Lim. 74, 75, 605, 618, 624; *Kent v. Day*, 1 Or. 130; *The People v. Cook*, 14 Barb. 259, 293, 294; *The People, ex rel. Brewster and Jones, v. Kilduff*, 15 Ill. 500; Civ. Code, 572, sec. 30.)

The finding that A. C. Young received a greater number of votes than each of the appellants is against the admitted facts by the pleadings; and the court could not decide upon his right to the office. (Civ. Code, p. 184, sec. 354; p. 185 sec. 358.)

While Young may have held a constructive residence within the corporate limits, he was not an actual resident of the town during the six months next preceding the election, and was not qualified to take the office. (Session Laws 1878, 122.)

Wm. R. Willis, for respondents:

The irregularities found in the third finding of facts herein are sufficient to avoid this election. (Session Laws 1878, p. 123, sec. 4; Civ. Code, p. 569, sec. 18; Id. p. 570, sec. 22.) But if the election be held regular, then J. D. McKinnon and Alva Pike were the only defendants who received a majority of the votes cast. (See fourth finding of fact.) A candidate is not elected if he receives no more votes than others. (Code, p. 573, secs. 35 and 36; *People v.*

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Moliter, 23 Mich. 341.) If A. C. Young was not eligible, then the office was vacant. (Dillon on Municipal Corp., sec. 135.) Or if he failed to qualify. (Code, p. 576, sec. 48, sub. 6.)

It follows, then, that three of the defendants, E. J. Page, J. H. Shupe, and George R. Sacry, received the highest and an equal number of votes for the office of trustee, and but two trustees to be elected—three of the five having been elected—so neither of them was elected. It appears on the face of this answer that defendants are claiming to hold their office by virtue of the same election and certificate of the same inspectors, as they claimed when the judgment of ouster was rendered against them. The inspectors of this election had no right to decide a tie vote by lot. (*Hannock v. Barnes*, 4 Bush. Ky. 390; Sess. Laws, 1878, p. 123, sec. 4; *Id.* p. 125, sec. 12.)

The said inspectors having canvassed the votes and given certificates of election, have exhausted their power over the subject, and can not afterwards reverse their decision by making a different determination. (*Hadley v. Mayor*, 33 N. Y. 603, 606; *Clark v. Buchanan*, 2 Minn. 298, 300, 301, 302; *The People v. Supervisors of Greene*, 12 Barb. 217, 221, 222.) It appears by the pleadings herein that the inspectors had long before this sitting canvassed the vote and issued certificates. Disobedience of this judgment is a contempt. (Code, p. 241, sec. 640, sub. 5.)

By the Court, WATSON, J.:

It appears from the transcript that this was an action commenced in the circuit court for Douglas county, upon the relation of J. H. Mahoney, for usurpation of office, under section 354 of the Civil Code.

The amended complaint alleges: That the plaintiff, James H. Mahoney, private party, is a resident voter and taxpayer in the city of Oakland, Douglas county, Oregon; that on the fourteenth day of December, 1878, in Douglas county, Oregon, the defendants, without any legal right, usurped and intruded into the office of trustees of the city of Oakland, a public corporation created by the authority

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of this state, and still unlawfully hold and exercise the same, and prays judgment that defendants are not entitled to the said office, and that they be ousted therefrom, and for plaintiff's costs and disbursements in this action. The complaint is verified by the relator.

The answer of the defendants denies specifically each material allegation in the complaint, except the due incorporation of the city of Oakland by state authority, and alleges: The passage and approval of the act of incorporation, October 17, 1878; the provisions in said act for the election of five trustees and other city officers; their election as trustees under the provisions thereof, on November 4, 1878, by receiving a higher number of votes than any other candidates; the receipt of certificates of election from the inspectors appointed by said act; and their subsequent qualification for and entry upon the duties of said office of trustees of said city, under and by authority of their said election, December 14, 1878.

The replication denies the conduct of said election according to the laws of Oregon, and alleges many instances of irregularity. Denies that, at the said election, any of the defendants, except J. D. McKinnon and Alva Pike, received a higher number of votes for said office of trustee than any other candidate thereat; and alleges that A. C. Young, E. J. Page, John H. Shupe, and John R. Sacry, as counted, received each an equal number of votes for said office; and denies that it is under and in pursuance of any election or qualification that defendants exercise the office of trustee, or that they have any lawful right so to do.

By the consent of parties, made in open court, and entered on the journal, trial by jury was waived, and the issues of fact as well as of law, were tried by the court at its May term, 1879. After hearing the evidence, the court, on July 14, 1879, and during the term, filed its finding of fact and conclusions of law, in writing, as provided in section 216 of the Civil Code. The findings, some nine in number, are quite lengthy, but in substance: That an election for trustees and other city officers was held in the city of Oakland, Oregon, on the first Monday in November,

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1878, and was, in all respects, conducted in accordance with the laws of Oregon, with the exception of certain irregularities, particularly set forth in the "third finding," which did not affect the result or render the election invalid, and occurred wholly through mistake; that during the election one ballot was received under protest, the name of the voter written upon it, and placed in the ballot box; also one ballot, written on colored paper, was received and placed in the ballot-box.

After the close of the election, and before the result was declared, both these ballots were taken out by the inspectors and rejected from the count. The first, on the ground of the voter's want of qualifications; the second, for not conforming to the statute, which requires the ballot to be "written or printed on plain white paper." That the persons voted for on the colored ballot were J. D. McKinnon, Alva Pike, E. J. Page, John H. Shupe, and Geo. R. Sacry. That after the close of the count, the inspectors declared the result to be that J. D. McKinnon had received fifty-one votes; E. J. Page, twenty-seven votes; Alva Pike, fifty-three votes; John H. Shupe, twenty-seven votes; George R. Sacry, twenty-seven votes; and A. C. Young, twenty-eight votes. That after the result of the election was declared, it being claimed that A. C. Young was ineligible, he formally withdrew his name as a candidate, and the inspectors thereupon issued to the defendants the certificates of election alleged in the answer, and that it was under and in pursuance of said election and qualification the defendants exercised the office of trustees of the city of Oakland.

The conclusions of law filed by the court were in effect: That the irregularities found did not invalidate the election; that said defendants J. D. McKinnon and Albert Pike were duly elected, and rightfully exercise the office of trustees of the city of Oakland; that the two ballots were rightly rejected by the inspectors; that A. C. Young was duly elected at said election to the office of trustee of the city of Oakland; that neither of the defendants E. J. Page, John H. Shupe, or George R. Sacry was elected to said office; that defendants J. D. McKinnon and Alva Pike are enti-

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tled to judgment; that they are not guilty of usurping or intruding into said office, and for their costs and disbursements, and that plaintiffs are entitled to judgment against the defendants E. J. Page, John H. Shupe, and George R. Sacry; that they are guilty of unlawfully holding and exercising the office of trustees of the city of Oakland, and that they be excluded therefrom, and for costs and disbursements. Judgment was rendered accordingly, but not entered until August 1, 1879.

From this judgment, the defendants John H. Shupe, E. J. Page, and George R. Sacry bring this appeal.

In the notice of appeal several grounds of errors are stated, out of which many questions arise. We shall consider such only as are deemed important to a proper decision of the case.

The appellants claim that under section five of the act of the legislative assembly incorporating the city of Oakland, the board of trustees has exclusive jurisdiction over all questions touching the election and qualifications of their own members, and consequently the circuit court erred in entertaining this action.

The portion of section five relied on by appellants to sustain this proposition, is as follows: "Sec. 5. That the board of trustees shall elect a president, keep a record of their proceedings, and meet at stated times, and at such other as the president shall appoint. They shall judge of the qualification and election of their own members, and decide contested elections of all town officers." (Session Laws 1878, page 123.)

The authorities upon the effect of such provisions in city charters are conflicting, but the weight of authority is against the proposition contended for appellants. In Pennsylvania, it was held in *Commonwealth, ex rel. McCurdy, v. Leach*, 44 Penn. St. 322, and *Commonwealth, ex rel. Messer*, Id. 341, that a similar provision in the charter of Philadelphia, excluded the jurisdiction of the courts; and the same doctrine is held in *Peabody v. School Committee of Boston*, 115 Mass. 383. The decisions in these cases are evidently based upon the seeming analogy between those

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bodies which, under city government, are commonly empowered to pass such ordinances as the public needs or interests of the city may require, and the respective houses, constituting the state and national legislatures, and the similarity of the words used in the city charters and state and national constitutions, in defining the powers of these respective bodies, to decide upon questions concerning the election and qualifications of their members.

In the more recent case of the *Commonwealth v. Allen*, 70 Penn. St. 465, this asserted analogy is ably refuted, and propositions announced, if not a decision made, in evident opposition to the doctrine laid down in the earlier Pennsylvania cases above cited. In rendering the decision, the court says: "The right of this court to issue the writ of *quo warranto* to determine questions of usurpation and forfeiture of office, in a public corporation, can not be questioned."

But the true principle is to first ascertain the intention of the legislature in the particular case, and then follow it; and the great preponderance of the authorities hold, "that the jurisdiction of the courts remains in such cases, unless it appears with unequivocal certainty that the legislature intended to take it away; and that language" (like that quoted above from the Oakland city charter) "will not have that effect, but be construed to afford a primary or cumulative tribunal only, and not an exclusive one." (1 *Dillon on Corporations*, sec. 141, and cases cited in note 2.)

People v. Hall, page 479 of the Reporter for April, 1880, decided by the New York court of appeals, is to the same effect, and contains an exhaustive and very able discussion of the whole subject. In this view we fully coincide, both on the ground of authority and sound reason.

Appellants make no objection to the action of the inspectors in rejecting the ballot for disqualification of the voter; but claim that the court below erred in holding that the inspectors rightly rejected the colored ballot. The authorities cited to sustain this proposition are not in point. They, perhaps, sufficiently illustrate the principle governing the construction of statutes defining the duties of public officers

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as to their being mandatory or directory merely, and the reluctance of the courts to construe statutes providing the manner of elections, so as to defeat the public will as expressed through the ballot-box; but disclose no instance where a voter has been accorded the privilege of disregarding a plain provision of law, intended to promote the purity and secure the independence of elections, even in depositing his vote.

Section 30, page 572 of the code, provides that "all ballots used at any election in this state shall be written or printed on plain white paper, without any mark or designation being placed thereon, whereby the same may be known or designated."

The voter in this instance is conclusively presumed to have had knowledge of this requirement, and to have had it in his power to comply with it, by using a proper ballot. It was a matter entirely under his own control, and if he chose to disregard the law, he can not complain, if the consequence was that his vote was lost.

It may be contended that, as the protection of the voter is the object of the law, he might waive it. But this practice might be carried to such an extent as to expose others and deprive them of the benefits of that secrecy which the law has endeavored to throw around the ballot-box. (*Commonwealth v. Wallper*, S. & R. 29, cited in *American Law of Elections*, secs. 401 and 402.)

The correct principle is announced in the case of *Kerr v. Rhodes*, 46 Cal. 398, which holds "that a ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control, such as the exact size of the ticket, the precise quality of the paper, or particular character of type or heading used, where the law has provisions to that effect; but if the elector willfully neglect to comply with requirements over which he has control, such as seeing that his ballot when delivered is not so marked that it may be identified, the ballot should be rejected." (*American Law of Elections*, sec. 403.)

The case under consideration is clearly within the princi-

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ple of the case just cited, and as clearly without the statutory requirements contained in the section of the code above quoted, and we think the colored ballot was properly rejected.

It is claimed that the court below erred in finding that A. C. Young was elected as one of the trustees of the city of Oakland. Young not being a party to the action, the finding of the court was not conclusive as to his right, yet it was a fact to be ascertained by the court, in order that it might be enabled to decide the real question in issue, whether appellants had or had not been elected. If Young had been elected, they had not. Upon the facts found by the court below Young was elected, and it was properly so held by that court.

The only remaining question material to be considered is, whether there was any error in the holding of the court below, that upon the facts found neither of the appellants was elected to the office of trustee of the city of Oakland. Upon the facts as found by the court, these three candidates received twenty-seven votes each, but there were only two offices to fill. It was a case of a tie vote.

Section 16, article 2, of our State constitution, provides that in all elections held under it the persons receiving the highest number of votes shall be declared duly elected; and our civil code, section 36, page 573, provides the mode of proceeding where the requisite number of county or precinct officers shall not be elected by reason of two or more persons having the highest and an equal number of votes for the same office. Upon such proceedings the successful party is declared duly elected, and this is equivalent to receiving the highest number of votes. But until this is done, in accordance with the statute, neither is elected. (American Law of Elections, secs. 169 and 170; *People v. Moliter*, 23 Mich. 341; *Hancock v. Barnes*, 4 Bush. Ky. 390.)

Whether A. C. Young was eligible or not is not for us to consider, as that was a fact found by the court below upon the evidence, which is not before us; but that his formal attempt to withdraw his name as a candidate, after the result was announced by the inspectors, was ineffectual, we have

Argument for Appellant.

no hesitancy in declaring, and it follows that the certificates of election thereupon issued to appellants were illegal and void.

If it should be held that the inspectors had the power under the charter to take the proceeding provided for in section 36, page 573 of the code, and decide by lot in a case like this, between the different candidates, and declare the successful candidates duly elected, it could not aid the appellants in this case, for the simple reason that those steps were not taken when they attempted to exercise the duties of the office of trustees, and the court below properly held such acts unwarrantable by law.

The judgment must be affirmed, with costs.

8	502
9	55
9	100
9	108

W. H. REMDALL, RESPONDENT, v. S.O. SWACKHAMER,
APPELLANT.

SHERIFF'S JURY—EFFECT OF VERDICT.—The verdict of the jury, rendered in writing and signed by the foreman, under section 284 of the Civil Code, operates as a full indemnity to the sheriff proceeding in accordance therewith.

IDEA.—Where the verdict is against the claimant, he can not afterwards maintain an action against the sheriff for the recovery of the possession of the property, or for damages for taking it, so long as the sheriff proceeds in accordance with the execution under which the property was seized.

APPEAL from Union County. The facts are stated in the opinion.

Baker & Eakin, and Dolph, Bronauyh, Dolph & Simon, for appellant:

It will be at once perceived that the correctness of the ruling and judgment of the court below, in deciding that the facts stated in said portion of the answer which was stricken out are insufficient to constitute a valid defense in this action, depends upon the proper construction of the meaning and effect of sections 283 and 284 of title 1, chapter 3, page 166 of our civil code. What is meant by the language used in said section 284, wherein it is declared that "the

Argument for Respondent.

verdict of such jury being rendered in writing, and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property or for damages for taking the same?"

We believe and maintain that the only possible, rational interpretation of this statute is that the sheriff is fully exonerated by such verdict, leaving the claimant to seek redress by maintaining his action for the recovery of the property, or its value, and for damages for taking the same against the plaintiff in the execution or the purchaser at sheriff's sale. We are at a loss to perceive how or in what sense the verdict can be at all an indemnity, much less a "full indemnity" to the sheriff, if he is nevertheless still liable for the return of the property, or its value, to the claimant, and for damages for taking the same, which is all that could be recovered if the verdict were no indemnity whatever to him, or if he occupied the position of a private person, found guilty in replevin in the *cepet* and *detinet*.

A construction similar to that for which we thus contend, has been placed upon analogous statutes in the following cases: *Storms v. Eaton*, 5 Neb. 453; *Patty v. Mansfield*, 8 Ohio, 369, 370; 11 Ohio St. 532; *Abbey v. Searls*, 4 Id. 598; *Ralston v. Oursler*, 12 Id. 111; 18 Ind. 439; *Jones v. Carr & Co.*, 16 Ohio St. 420; *Fisher v. Gordon*, 8 Mo. 387; *Canifax v. Chapman*, 7 Id. 175; *Rowe v. Bowen*, 28 Ill. 117.

The California decisions are based upon an entirely different statute, which does not make the verdict of the sheriff's jury any protection whatever to the officer, but only advisory to him. (See *Perkins v. Thomburgh*, 10 Cal. 189-192.)

Frank M. Ish and Shattuck & Killin, for respondent:

The sole point presented by this transcript is, whether the verdict of a sheriff's jury constitutes an adjudication or judgment which bars the claimant thereafter to set up title to the property. Section 283 of the Civil Code provides that "when personal property shall be seized by virtue of

Argument for Respondent.

any execution, and any person other than the defendant shall claim such property or any part thereof, and shall give notice thereof in writing, the sheriff may summon from his county six persons qualified as jurors between the parties to try the validity of the claim, giving five days' notice of the time and place of the trial to the plaintiff in the execution, or his attorney."

And there are in section 284 the following provisions: "On the trial, the defendant and claimant may be examined by the plaintiff as witnesses, and the verdict of such jury being rendered in writing and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property, or for damages for taking the same." Section 286 provides that notwithstanding the verdict may be for claimant, the plaintiff may have the property sold by indemnifying the sheriff. There is no provision for notice to claimant of the time and place of trial and no provision for appeal.

This verdict can not be pleaded as a bar unless it is "the final determination of the rights of the parties." (Civil Code, sec. 240.) This is not a judgment, because not rendered by any court. There are no courts under our constitution except supreme, circuit, county, and justice courts. (Constitution, art. 7, sec. 1, p. 87.)

The plea is bad for uncertainty. *Jacob Bros. & Co. v. James Remdall et al.* is not a sufficiently definite description of the parties to the judgment. The greatest effect such a verdict can have is as evidence on the measure of damages.

Herman on Executions, sec. 189, in speaking of these inquisitions, says: "Which action by the officer may be given in evidence to prove that he acted without malice and will mitigate damages in an action against him for taking the goods from a third person." "And as it is not a proceeding immediately from the tribunal from which the process issues, but merely to indemnify the officer in making his return to the writ, they will not set aside the verdict of a jury, summoned by an officer to inquire in whom the property, in

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the goods seized by him under an execution, is vested." "But this proceeding is not conclusive in any case * * * and the verdict is admissible neither for the claimant nor the officer in an action against him for trespass." (Freeman on Executions, 254, 275; 12 Ill. 387; 28 Id. 116; 10 Cal. 190; 28 Id. 123.) At common law plaintiff had the right to bring his action against the sheriff. (9 Am. Dec. 104 and note; 2 N. H., 412; 12 Am. Dec. 393; 2 A. K. Marshall, 268; 3 Cal. 369; 14 Id. 194; 30 Id. 190; 14 Johns. 84; 20 Id. 465; 3 Wend. 280.)

The plea in this case was certainly bad unless the right of action was gone, unless the verdict was an adjudication between the parties. It could not be an adjudication because it was not in any court, and because the statute expressly declares that it shall not preclude the claimant.

By the Court, WATSON, J.:

This is an action against the sheriff of Union county, for the recovery of certain personal property seized by him on execution, and damages for the taking.

After the sheriff had taken possession of the property as the property of James Remdell, defendant in said execution, the respondent served a notice, in writing, upon him, claiming the property. Thereupon the sheriff summoned a jury to try the validity of the claim, gave notice to plaintiff in the execution, and a trial was had in substantial conformity to the provisions of sections 283 and 284 of the code, resulting in a verdict adverse to the claimant. Notwithstanding the verdict of the jury, and while the property was yet in the sheriff's hands, the respondent brought this action.

The defendant pleaded the verdict as a defense to the action, which plea and defense was stricken out of the answer by the court, on the motion of respondent, as irrelevant, and this order of the court below is assigned as error on this appeal.

The particular question presented to this court for determination is, whether the verdict of a sheriff's jury against the claimant, under sections 283 and 284 of the Civil Code, can be pleaded as a full defense by the sheriff to an action

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brought by the claimant against him for the recovery of the property, and damages for taking it.

Section 284 declares that the "verdict of such jury, being rendered in writing and signed by the foreman, shall be a full indemnity to the sheriff proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property, or for damages for taking the same." The question is upon the meaning and validity of this section. If the legislature had simply mooted that "the verdict of the jury, rendered in writing and signed by the foreman, should be a full indemnity to the sheriff proceeding in accordance therewith," there would be no difficulty in ascertaining the meaning.

If the verdict should be for the claimant, the sheriff would be justified in delivering the property to him, unless the plaintiff in the execution tendered the written undertaking of indemnity provided for in section 286, and thereby made it his duty to proceed and sell the property notwithstanding the verdict, or if it should be against claimant, the sheriff would be fully protected by it in retaining possession of the property, and disposing of it according to the commands of the execution.

In either case he would be proceeding in accordance with the verdict, and no action would lie against him either to recover possession of the property or for damages. Such would be the obvious and natural import of the words employed. But by the succeeding clauses of this section, it is declared that "the claimant shall not be precluded by the verdict from maintaining his action at law for the recovery of the property, or for damages for taking the same."

Do these clauses mean that the claimant may, notwithstanding the verdict against him, maintain his action against the sheriff for the possession of the property, or for damages for taking it? If this is the true meaning, it is obvious that the "full indemnity" provided for the sheriff in the preceding part of the section, is greatly impaired; in fact, for all practical purposes, destroyed. There would be no "full indemnity," practically no indemnity at all. It would

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be in the power of the claimant, in every case, after a verdict adverse to him, to bring his action against the sheriff while the property still remained in his hands, to recover possession of it, with damages for the taking and detention, and if he proceeded in accordance with the verdict to retain possession of the property, and dispose of it in obedience to the commands of the execution, it would be at his peril.

By the common law a sheriff might, upon his own motion, summon a jury to inquire into the right to property, and the verdict, while it did not determine the right of property between the litigating parties, protected the sheriff against an action for a false return by the plaintiff in the execution, when the return was *nulla bona* in accordance with the verdict of the jury. (*Fisher v. Gordon*, 8 Mo. 386; *Bayley v. Bolis*, 8 Johns. 185; *Crocker on Sheriffs*, sec. 446.)

This is the original of our statute, and the statutes of other states upon the subject, where the consequences and effects of such verdicts have been extended and rendered more important. In some of the states, under their peculiar statutes, the proceeding has become judicial, and the verdict and judgment thereon is a final and conclusive determination of the right of property. (Act of Penn. of April 10, 1848; 1 Purden's Digest (10 ed.), 643; 68 Penn. St. 60.)

In Missouri, Ohio, and Illinois, the proceeding has been held not judicial, and yet the courts of those states have uniformly held that the sheriff was entitled to whatever protection their peculiar statutes declared he should have under this proceeding, and that those statutes did not conflict with the provisions of their state constitutions, in every respect similar to our own. (*Fisher v. Gordon*, 8 Mo. 386; *Schroeder v. Clark*, 18 Id. 184; *Patty v. Mansfield*, 8 Ohio 370; 16 Ohio Stat. 420; *Rowe v. Bowen*, 28 Ill. 116.)

We think these, and numerous other authorities, not necessary to cite, settle the question as to the validity of these proceedings, and fully entitled the sheriff to whatever measure of protection the particular statute under examination intended he should have. But the question still remains as to the extent of the protection intended to be afforded the sheriff by our own statute.

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In *Patty v. Mansfield*, 8 Ohio, 370, above cited, on a statute which provided that "such judgment for the claimant as aforesaid, shall be a justification to the officer in returning *nulla bona* to the writ of execution, by virtue of which the levy had been made as to such part of the goods and chattels as were found to belong to such claimant," the court held that the decision being adverse to the claimant, protected the sheriff against an action of replevin by the claimant for the property, and a plea thereof a full defense to such action. In rendering this decision Judge Hitchcock says: "As the statute does not specifically declare that in such case the officer shall be protected, it seems to be supposed by the plaintiff in the present case that he may be subsequently subjected to an action at common law for the property, or to respond in damages for its value. We think, however, that such is not a proper construction of this statute. We suppose that in the enactment of this law the legislature had two objects in view; one was to enable an individual whose property had, through mistake, been levied upon, to recover the possession in a summary manner. The other, and the principal, was to furnish protection to an officer of the law, who should make a mistake in the discharge of his duty. This latter object would not be effected, if, after a trial of the right of property, and a decision against the claimant, the officer could still be subjected to an action at his suit."

A construction almost as broad was adopted by the supreme court of Missouri in the case of *Schroeder v. Clark*, 18 Mo. 184, cited above. The statute provided that "if the jury find the goods and chattels to be the property of the defendant in the execution, the verdict, as against the claimant, shall justify the officer in selling such goods and chattels." The court held upon this statute that a verdict adverse to claimant was a bar to an action by him against the officer for the possession of such property.

Adapting the liberal principles of construction observed by the highest courts in many of the other states, in determining the meaning and intention of similar statutes upon the same subject, we feel bound to so construe our own as

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to give the sheriff acting in good faith, and in the line of official duty, the fullest indemnity which a due regard for established rules of construction will allow, keeping in view the object of the statute, and in order to give every part of it a reasonable effect, to reconcile all its provisions, and escape any repugnancy which would render any part void, or the whole ineffectual for the fulfillment of its evident purpose and design, we hold that the effect of the verdict of the sheriff's jury under consideration was to fully indemnify and protect the sheriff against any action by the claimant, for acts done by him under and by virtue of the execution; that the clauses in said section 284, succeeding the one giving "full indemnity," and formally declaring the right of the claimant to still maintain his action to recover possession of the property, or for damages for taking the same, notwithstanding the verdict, should not be construed as referring to the sheriff, or in any manner affecting his "full indemnity," but as referring to other parties than the sheriff, who are neither bound by the result in this proceeding, nor derive any immunity therefrom. (Dwarris on Stats., 660, 706; Sedgwick on Stat. and Com. Law, 57, 60, 62, 63.)

If this view of the law is correct, it was error in the circuit court to strike out the portion of appellant's answer setting up the respondent's claim and adverse verdict of the sheriff's jury thereon as a defense to the action, and for this reason the order and judgment of the court below must be reversed, and the cause remanded for further proceedings in accordance with this decision.

THE CITY OF ROSEBURG, APPELLANT, *v. SOLOMON ABRAHAM, RESPONDENT.*

PLEADING—PUBLIC NUISANCE—SPECIAL DAMAGE MUST BE ALLEGED.—The complaint in an action for damages occasioned by a public nuisance, must allege facts showing that the complainant has suffered some special or extraordinary damage, beyond what has been occasioned to the public generally, or it will be held insufficient on demurrer.

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APPEAL from Douglas County. The facts are stated in the opinion.

Herman and Ball, for appellants.

Wm. R. Willis, for respondent.

By the Court, WATSON, J.:

This was an action for damages under section 330 of the Civil Code. The pleadings are commendably brief, and consist only of the complaint and a demurrer.

The complaint alleges: "That the plaintiff is a municipal corporation, duly organized under and by virtue of an act of the legislative assembly of the state of Oregon, approved October 3, 1872, and as such entitled to the public use of the public streets, lanes, and alleys included within its corporate limits. That the defendant has, since the organization of said corporation, and still does prevent the plaintiff from the use of a portion of Washington street (particularly described in the complaint), within the limits of said city, by erecting fences across the same, and inclosing it as his private property. That by reason of said obstruction and inclosure of said street, the plaintiff is entirely deprived of the use of the same, to its damage in the sum of one hundred dollars;" and concludes with a prayer for judgment for said sum, and "that a warrant may issue to the sheriff to abate said nuisance."

The defendant demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer, and gave defendant judgment for costs. And from this ruling and judgment plaintiff has brought this appeal.

Section 330 is as follows: "Any person whose property is affected by a private nuisance, or whose personal enjoyment thereof is in like manner affected thereby, may maintain an action at law for damages therefor. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate

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such nuisance. Such motion must be made at the term at which the judgment is given, and shall be allowed of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may proceed in equity to have the defendant enjoined."

The point claimed on the demurrer is that the complaint does not state facts which make out a case either under this section or at common law. That the act complained of is a public nuisance, for which no action for damages lies, and no facts are stated in the complaint, taking this case out of the general rule.

It is conceded that the city of Roseburg is a person within the meaning of the said section 330. It is plain that the act complained of is a public or common nuisance. The fencing up, without authority, of a public street in an incorporated city affects a right common to every citizen thereof, and works a common injury. (2 Dill. on Mun. Corp., secs. 520, 521, and note 1; 2 Bouvier's Law Dict. 245, title "Nuisance;" *State v. Woodward*, 23 Vt. 92; *Village of Mankato v. Willard*, 13 Minn. 27.)

The general rule that damage occasioned by a public nuisance will not support an action at law by the individual suffering the same, is maintained by all the authorities. The reason of this rule is thus clearly stated in *Pittsburg v. Scott*, 1 Pa. St. 319: "That the damage being common to all, no one can assign his particular portion of it, or if he could, it would be extremely hard if every one was allowed to harass the offender with separate actions. For this reason no person, natural or corporate, can have an action for a public nuisance, or punish it, but only the commonwealth."

This same authority, however, holds that the rule has its exceptions. After stating the rule as above, it continues: "Yet the rule admits of exceptions. When a private person suffers some extraordinary damage, beyond other citizens, by a public nuisance, in that case he shall have a private satisfaction by action. As if by means of a ditch dug across a public way, which is a common nuisance, a man

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suffer any injury by falling therein, then for his particular damage, which is not common to others, the party shall have his action." (Cites 3 Bl. Com. 219.)

It is argued as a general principle that for an obstruction to a highway, which is a common nuisance, an action can not be supported by a person who has suffered some special damage. To the same effect, both as to the rule and exception, are *Garrish v. Brown*, 51 Me. 256; *Gordon v. Baxter*, 74 N. C. 470; *Schuth v. N. P. T. Co.*, 50 Cal. 592, and numerous other authorities cited by counsel for respondent.

While it is conceded that the appellant in this case, the city of Roseburg, has every right and remedy in the premises that any private person could have, it is denied, and we conceive justly, that she has any more. She can maintain an action for damages to her corporate rights, or property, only in cases where an individual could for like injuries to his individual rights, or property. As a corporation she had the same right to use this street for any practical purpose within the scope of the powers conferred upon her by her charter, as any of her citizens had. Any permanent, unauthorized obstruction of the street would be a public nuisance, affecting her rights equally with the rights of all her citizens. It does not appear that either she or they had any title to the land, or anything more than a public and common right to use the street for ordinary and common purposes. The complaint merely alleges that she has been wholly deprived of the public use of this street. So had every citizen of Roseburg. If she can maintain this action, so can each of her citizens maintain a similar one, without alleging special damage.

No special damage, nor any fact from which such damage might be deduced, is averred, and this, we hold, was necessary.

There was no error in the ruling of the court below sustaining the demurrer, and the judgment must be affirmed.

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H. O. TENNY AND NEIL MCKENZIE, PARTNERS UNDER THE FIRM NAME OF TENNY & MCKENZIE, RESPONDENTS, v. N. E. MULVANEY AND E. C. BEMIS, APPELLANTS.

EVIDENCE—INADMISSIBLE QUESTION.—Where the contract provided for the delivery of good, sound, merchantable logs, to be cut from standing timber within a mile from a certain creek, and there was evidence showing that the logs were cut within a fourth of a mile from said creek, and that where the logs were cut the timber was inferior, and a great many trees were rotten; *Held*, that the question, “Are these average logs on the ground where they were cut?” was inadmissible.

ITEM.—Where a witness was asked the question, “Are these as good logs as other logs on the creek?” and there was no evidence showing the kind or quality of the other logs on the creek, or what particular other logs on the creek were referred to; *Held*, that the question assumed a fact which it was the object of the question to prove, and was incompetent.

ERROR—ASSUMING FACTS NOT IN EVIDENCE.—It is error sufficient to reverse a judgment to permit counsel to state, against objection, facts not in evidence and pertinent to the issue, or to assume, *arguendo*, such facts to be in the case when they are not.

APPEAL from Douglas County. The facts are stated in the opinion.

Wm. R. Willis, for appellants.

L. F. Lane, Hermann & Ball, and Kelsay & Burnett, for respondents.

By the Court, LORD, C. J.:

The plaintiffs allege, substantially, that on the twenty-ninth of May, 1878, plaintiffs made an agreement with defendants by which plaintiffs agreed to furnish defendants at their boom in Pass creek, in Douglas county, good, sound, merchantable logs for the agreed price of four dollars and twenty-five cents per one thousand feet; and defendants agreed to scale and pay for each one hundred thousand feet when placed in floating water above the boom;

That plaintiffs delivered in said boom one hundred and sixty-five thousand one hundred and sixty-nine feet of

9	513
9	407
9	411
11	399
4*	1206
8	513
29	316
8	513
32	67
8	513
41	116

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good, sound, merchantable logs, and also delivered in floating water above the boom one hundred and thirty-nine thousand six hundred and fifty-four feet under said agreement. The defendants thereby became liable to pay plaintiffs therefor one thousand two hundred and eighty-five dollars and forty-nine cents;

That one hundred and thirty-five dollars has been paid, and there is now due one thousand one hundred and fifty dollars. Plaintiffs demanded payment, but defendants refused to pay any part thereof. And for other and separate cause of action alleges substantially:

That by the terms of said agreement defendants agreed to furnish the standing timber within one mile of the creek, and to scale and pay plaintiffs for each one hundred thousand feet when placed in floating water; and plaintiffs were to deliver to defendants, at their boom in Pass creek, one million feet of good, sound, merchantable logs, with privilege of furnishing as much more as they could put in the creek within one year; that after making said agreement plaintiffs had partially completed it, and had cut a large amount of logs, and were proceeding to completion, etc.;

That on the fourteenth of August, 1878, without fault or consent of plaintiffs, the defendants rescinded and breached said contract, and refused to receive the logs so cut and ready to be delivered, and prohibited plaintiffs delivering the same, and refused to scale or pay for the logs in floating water, and still refuse to pay for said logs, etc.;

That plaintiffs have been ready and willing to deliver, and would have delivered before the expiration of the year, one million five hundred thousand feet, if they had not been prevented by defendants;

That plaintiffs have been damaged, by defendants breaching said contract, in the sum of three thousand dollars, in addition to amount claimed in foregoing cause of action, and the same has not been paid; and set up another cause of action not material to this appeal, and demand judgment for four thousand and ninety dollars and fifty cents.

Defendants for answer deny that the agreement was to furnish logs at four dollars and twenty-five cents per thou-

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sand, etc., but allege that plaintiffs were to furnish one million feet within one year, and to keep logs on hand so that the mill should not be shut down during the year for want of logs, at the rate of four dollars and twenty-five cents per thousand, with the privilege of putting in more if it could be done within the year, at the same price. Deny that the defendants agreed to pay for each one hundred thousand feet, or any part thereof, until the contract was completed at the end of the year. Deny the amount of logs delivered in the boom and in floating water. Deny the indebtedness of one thousand one hundred and fifty dollars, or any part thereof. And allege that no part of the money claimed was due at the commencement of this action, or before the completion of the contract at the end of the year; and for answer to plaintiff's other and separate cause of action. Deny that by the terms of said agreement defendants were to pay for each one hundred thousand feet of logs when placed in floating water in said creek, or any part thereof, until said contract was completed at the end of the year.

Deny that defendants breached the contract in any manner, or that plaintiffs were able, or willing, or would have furnished one million five hundred thousand feet of logs within the year, or any part thereof, if they had not been prevented by defendants. Deny that plaintiffs have been damaged by defendants in any sum.

Defendants further answering, and for counter-claim, allege: That defendants have at all times been ready and willing to perform the conditions of the agreement made the twenty-ninth day of May, 1878, a copy of which is hereto annexed, marked exhibit "A," and made a part of this answer as follows:

"EXHIBIT 'A.'—This article of agreement, made and entered into this twenty-ninth day of May, 1878, between N. E. Mulvaney and E. C. Bemis, of firm name of Mulvaney & Bemis, parties of the first part, and H. O. Tenny and Neil McKenzie, of the firm name of Tenny & McKenzie, parties of the second part. Parties of the first part agree to pay parties of the second part four dollars and twenty-five cents per thousand feet for good, sound, merchantable

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logs, delivered at the boom in Pass creek; also agree to furnish timber for logs not to exceed a mile from the bank of the creek; to scale each one hundred thousand feet that is in floating water.

“The parties of the second part agree to furnish logs to the parties of the first part, one million feet with privilege of furnishing as much more as can be put in the creek in the year, from this date, in the boom in Pass creek; the parties of the second part shall keep logs on hand for the parties of the first part, so that the mill shall not be shut down during the year, and are to cut four hundred thousand feet, more or less, from Richey canyon.

(Signed) “MULVANEY & BEMIS,
 “TENNY & MCKENZIE.

“Witness: J. W. KREWSON,
 “A. SHERRELL.”

And allege: That plaintiffs failed and refused to comply with said agreement; that they put into the boom and floating water a large amount of unsound and unmerchantable logs, and prevented defendants from getting in logs to keep their mill running; that their mill was for a long time shut down by reason of plaintiffs' failure to perform the conditions of said agreement, on their part, to defendants' damage four thousand dollars, and demand judgment for four thousand dollars.

The replication denies the allegations in the counter-claim. It appears by the bill of exceptions that plaintiffs, to maintain the issues on their part, proved by McKenzie that the timber in the vicinity of defendants' mill, where the logs were cut, was inferior timber, and that a great many trees were rotten. William Rosee was called by the plaintiffs, and asked: “Are these average logs on the ground where they were cut?” Defendants objected. The court overruled the objection, and the witness testified: “They were average logs on the ground where they were cut.” The contract provides that the logs were to be good, sound, merchantable logs, and to be cut within a space “not to exceed a mile from the bank of the creek.” It is claimed that logs

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based on an average of the timber in the locality from where they were to be cut, in which there were "inferior timber, and a great many rotten trees," would not be the "good, sound, merchantable logs" for which the contract expressly provided.

It is to be presumed that the parties to the contract used the descriptive words, "good, sound, and merchantable," in the sense in which such words are generally used and applied at the place where the contract was to be executed, and in that sense understood that the particular locality within which the logs were to be cut contained that kind of standing timber which would furnish the "good, sound, merchantable logs" for which the contract called. The bill of exceptions does not disclose any testimony from which any definite opinion can be formed, as to what kind of logs would be commonly considered in the locality in which the contract was to be performed, as "good, sound, and merchantable."

That there were such logs within the area from which they were to be cut by the contract, is a fact directly testified to by the witness, Mattoon. He testifies that "there were a plenty of good, sound, merchantable logs within a mile of the creek," and also that plaintiffs "did not cut any logs that were more than a quarter of a mile from the creek."

Taking the testimony of this witness in connection with the testimony of McKenzie, that the timber in the vicinity of the mill, and where the logs were cut from, was inferior timber, and that a great many of the trees were rotten, and some idea may be formed as to what would be "average logs" on the ground where they were cut.

It should be observed, too, that the testimony of McKenzie does not exclude the idea that there was not sufficient standing timber not inferior, and trees not rotten, from which good, sound, and merchantable logs could be cut within a mile of the creek, as specified in the contract. At a former term, when this same case was before the court, a similar question was asked this same witness. The question then was, "Are these an average of the logs on Pass creek?" which is not exactly identical with the question

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asked here: "Are these average logs on the ground where they were cut?"

In passing on the former question, the court said: "As the logs were to be taken from the standing timber in a particular locality, we are of the opinion that the question was properly admitted." The "average logs on Pass creek," which the court admitted to prove the kind of logs for which the contract expressly provided, was based on the general character of the standing timber from the whole area from which the logs were to be cut, and not on any limited space or ground on this area where the logs were cut. We admit the force of the argument that a decision once made in a case must continue to govern it, except when the record on the second hearing contains evidence of different or additional facts. (25 Mich. 463.)

It is our opinion that the question, "Are these average logs on the ground where they were cut?" was not admissible for the purpose for which it was offered. The contract was a written one, and the kind of logs to be furnished specified, and it was the agreement of plaintiffs to cut from the standing timber, within a mile from the bank of the creek, such logs only, without regard to the rotten trees and inferior timber, as would fairly comply with the terms of the contract, in the sense in which the terms used are commonly employed in contracts for logs in this locality, as before indicated.

The next objection is to the testimony of H. O. Tenny, one of the plaintiffs. Plaintiffs' counsel asked said witness: "Were these as good as other logs on the creek?" Defendants objected, and the objection was overruled, and the witness answered: "I hauled logs for Comstock, and these logs were as good logs as I hauled for Comstock." The objection was not to the question as leading, but as irrelevant and incompetent. There is no doubt but the question plainly suggests the answer desired. It seems to us to assume, too, that there were other logs on the creek which had been shown to be, or were the kind of logs for which the contract provided, and that these logs in dispute were as good as such other logs on the creek.

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We do not think that a question which assumes as a fact that which is the object of the question to prove, is competent. To elicit competent evidence it must be by an appropriate question directed to the fact in controversy.

Another objection disclosed by the bill of exceptions, is that in the closing argument to the jury the counsel for the plaintiff stated that McKenzie testified that Mulvaney, one of the defendants, had agreed to remove the obstructions out of the creek. This was objected to, on the ground that there was no issue in the pleadings on that question. The court overruled the objection, and the counsel for the plaintiffs stated that the defendants had agreed to clear the creek of obstructions, and had failed to do so. It appears, by the bill of exceptions, that this evidence of McKenzie had been admitted during the trial without objection, and that some evidence had been given, tending to show that a portion of the logs which were in the water, and which were mixed with the logs in dispute, and claimed by the defendants to be rotten and unmerchantable, were drift logs from old drifts in the creek, and not put in by the plaintiffs, and that they floated down the creek and became mixed with the logs of plaintiffs, without their fault. It was in respect to this evidence to which counsel for plaintiffs alluded when he referred to the evidence of McKenzie, and counsel for defendants objected. The court declined to stop him, but said to counsel that it would in its charge instruct the jury not to consider this evidence of McKenzie, and no further allusion was made to it by Mr. Hermann, of counsel for plaintiffs.

In his charge, the court said: "There being no issue in the pleadings herein, nor in this contract, in regard to defendants cleaning out the creek, you can not consider that question, nor any testimony given on that question." We do not think that the rights of defendants were prejudiced in this matter, when it appears that the court, at the time the objection was made, stated to counsel that he would instruct the jury not to consider the evidence of McKenzie, and in his instructions specifically charged the jury they

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could not consider that question, nor any testimony given on that question.

The next objection is that counsel for the plaintiffs, in his argument, stated that the creek was a public highway, and that defendants had obstructed it by placing a boom across it at their mill. Defendants objected to arguing this matter on the ground that there was no issue in the pleadings as to the creek or boom, and the objection was overruled, and the counsel stated to the jury that the defendants had obstructed the creek, a public highway, by placing a boom across it without authority of law; that it was this obstruction that prevented plaintiffs from separating the rotten and bad logs from the good logs.

It appears that defendants had offered some evidence tending to show that a portion of the logs put in the creek by plaintiffs were rotten and unmerchantable, and that to draw them out of the creek, in order to separate them from the good logs and get them out of the way at the boom, would cause them great expense. To obviate the effect of this evidence, plaintiffs offered some evidence tending to show that to put them through the boom and let them float down the creek would cost but little. Defendants then offered evidence tending to show that certain other persons were proprietors of a dam and mill below the boom, on the creek, and would not allow them to open the boom and let the logs pass down.

In his argument to the jury the counsel for the defendants claimed that the defendants could not be required to open their boom and let the logs float down the creek, rather than to draw them out of the creek with oxen, and it was in reply to this argument that counsel for the plaintiffs stated that defendants had obstructed the creek, a public highway, by placing a boom across it without authority of law, and that it was this obstruction that prevented the plaintiffs from separating the rotten logs from the good logs.

There is nothing in the contract, nor in the issue made by the pleadings, in respect to these matters. The only mention of the boom in the contract is the agreement of plaintiffs to deliver the logs at the boom in Pass creek.

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There is a question raised by the evidence above stated about the expense it would require to separate the rotten logs from the good logs, by opening the boom and letting them float down the creek, or by hauling them out with oxen. If Pass creek is a public highway, it will be admitted that no one has a right to obstruct it, and if the defendants opened their boom and let rotten logs float down it, they would do so at their peril, and would be bound to see that they did not thereby obstruct its navigation, nor infringe upon the rights of private individuals. So, too, the defendants have a right to use a boom for the purpose of catching their logs, provided it does not obstruct the navigation of the creek; but we do not see the relevancy of these matters to the issue joined in this action. If the boom creates an obstruction to the navigation of the logs down the creek, it is a nuisance and can be abated; but that question is hardly involved in this case. There is not only no allegation in the pleadings, but there is no evidence disclosed by the record that authorized the counsel to make such statement to the jury. We think the effect was to mislead and confuse the mind of the jury to the prejudice of defendants.

It was also objected that the counsel for the plaintiffs stated to the jury that Mr. Bemis, one of the defendants, was absent, and had not been called as a witness. The objection was that there was nothing to show why Mr. Bemis was not present, or what his testimony would have been if present. The court overruled the objection, and counsel for the plaintiffs stated that "Mr. Bemis' testimony was willfully suppressed, and the jury had a right to presume that if he had been present and sworn, his evidence would have been adverse to the defendants." To this the defendants excepted.

The only charge made by the court in respect to this matter was that some evidence had been admitted, without objection, tending to show admissions of Mr. Bemis, one of the defendants, as to the quality of the logs furnished plaintiffs. Bemis was not sworn as a witness at the trial, nor was his evidence offered. The rule is, although fre-

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quently violated, that counsel must confine themselves to facts in evidence. It is held to be the strict duty of the court to arrest an argument not based on evidence. (Weeks on Attorneys at law, sec. 112; Proffatt on Jury Trials, sec. 250; Hilliard on New Trials, sec. 40, p. 224.) And if objection be made to this course of argument, it is error for the court to permit it, and a new trial will be granted. (Same authorities.)

Counsel stated to the jury that Mr. Bemis was absent, and had not been called as a witness; and, against the objection of counsel for the defendants, argued that his evidence was willfully suppressed; and that the jury had a right to presume, if he had been present and sworn, that his evidence would have been adverse to the defendants. If the fact was in evidence that Bemis' evidence had been willfully suppressed, there would be no doubt of the presumption, as claimed by the counsel, but the record does not disclose any such fact. It is wholly gratuitous, and assumes, *arguendo*, a fact to be in the case when it is not. This is held to be error sufficient to reverse a judgment when allowed against the objection of counsel. (22 Wis. 292; 41 N. H. 317; 75 N. C. 306; 49 Ind. 33; 25 Ga. 225.)

The judgment is reversed, and the case is remanded to the court below for a new trial.

8	522
21	12
21	14
28*	1007
28*	1008
8	522
41	404

SARAH C. WEISS, APPELLANT, *v.* ALBERT BETHEL,
WILLIAM GIRD ET AL., RESPONDENTS.

WHERE A DECREE OF DIVORCE IS SILENT AS TO THE DISPOSITION OF PROPERTY, the right thereto, given by section 495 of the Civil Code, may, in any case requiring the interposition of a court of equity, be enforced in an original suit in the circuit court for the county where the real estate is situated, without disturbing the original decree of divorce.

PLEADING—COMPLAINT DOES NOT STATE FACTS CONSTITUTING CAUSE OF SUIT, WHEN.—A complaint in a suit brought to establish plaintiff's right to an undivided one third part of certain real property, does not state facts sufficient to constitute a cause of suit against a defendant which merely alleges complainant's right to such undivided one third, and "that defendant is in possession of the whole of said property, and claims some interest in the same as owner thereof."

Opinion of the Court—Watson, J.

SUIT BROUGHT IN WRONG COUNTY—OBJECTION HOW AVOIDED.—Where suit is brought to determine an adverse claim to real property, in the wrong county, a subsequent change, by order of the court, before answer, to the proper county, cures the defect and avoids the objection.

THE PLAINTIFF MAY JOIN IN HER SUIT, to enforce her right to land, and obtain the legal title from one party, any other parties who may be in possession claiming adversely to her right.

COMPLAINT—FRAUDULENT CONDUCT NOT AFFECTING RIGHTS.—The complaint is insufficient as to a defendant who is merely charged with fraudulent conduct which does not affect the right of complainant in controversy.

LACHES, WHAT DELAY AMOUNTS TO.—A delay of over thirteen years, with sufficient knowledge to put one on inquiry in prosecuting a right where due diligence is required, is unreasonable, and amounts to laches.

APPEAL from Benton county. The facts are stated in the opinion.

Chenoweth and Johnson, for appellant.

Burnett & Kelsay, and Thayer & Williams, for respondents.

By the Court, WATSON, J.:

This suit was originally commenced in the circuit court for Jackson county, but afterwards transferred to that of Benton county, by an order of the court first named, upon written stipulation of parties. After the transfer, plaintiff filed an amended complaint, by leave of the court, and made several other parties defendants.

Her amended complaint states, in substance, that she was married to defendant, Albert Bethel, in 1857, and lawfully obtained a divorce from him, on the ground of desertion, at the June term, 1866, of the circuit court for Jackson county. That, at the time of the divorce, the defendant, Albert Bethel, was the owner of the Adam Holder donation land claim in Benton county, Oregon, in T. 13 S., R. 5 W., containing three hundred and one and sixty-two one hundredth acres; also, of lots 1, 2, 3, and 4, in block 3, of the city of Corvallis in said county. That at the time she filed her complaint for divorce, she was ignorant of the condition of said real estate.

That said Bethel kept his business secret from her, and led her to believe that he had sold or effectually incumbered

Opinion of the Court—Watson, J.

it, so that at the time she did not know what disposition he had made of said real estate.

She knew at that time that he had by some contrivance covered up and secreted said land, but did not know what the nature of the contrivance was, and was entirely ignorant of any and all testimony to establish the same, and was ignorant for a long time after said decree was rendered, of either the act of said Bethel in secreting said property, or the parties who acted with him in said contrivance. For the above-named reasons no mention was made in her application for said divorce. That plaintiff has since learned that said real estate was secreted and covered up by the following contrivance:

That on or about the year 1860 the said Albert Bethel purchased of one William Hunter, the said Holder donation land claim, and plaintiff and Bethel took possession of it on the fourteenth day of January, 1861. That the defendant William Gird, by a contrivance with said Albert Bethel, procured a deed to said land direct from said Holder to Gird, which was kept secret from plaintiff. That said Bethel induced plaintiff to give up possession of said land to Gird, alleging he had leased it to him, which was false and fraudulent, and done to deceive plaintiff, and did deceive her. That said defendant Gird knew that said land had been deeded by said Hunter to Bethel, and that it belonged to him. That prior to the time said Hunter sold said land to Bethel, he had purchased it of Holder, and paid full value for it; and that at the time Holder sold said land to Gird, he was not in possession thereof, and had no interest therein. That said deed was fraudulent and of no effect, and done to defraud plaintiff. That said Gird and Holder knew it was done to defraud plaintiff. That said Bethel did not record the said deed from Hunter to him, and that the suppression of said deed was a part of said contrivance to deceive and cheat her. That plaintiff does not know where said deed now is, nor its precise date, but it was about a year prior to said deed of Holder to Gird, of January 14, 1861. That plaintiff never sold or assigned her right to said land, and that said Bethel was

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the owner thereof at the date of said decree in 1866. That but for said fraudulent contrivances she would have had said court set off to her one-third of said land in fee simple.

Plaintiff alleges that the other defendants claim some interest in said land, the nature of which plaintiff does not know. That defendants John Osborn and William Fliedner are in possession of and claim to have some interest in said lots as owners thereof. That defendants Henry Kampps, Laura Irwin, Julia Holder, Margarett Kampp, Mary McBee, and William H. McBee have or claim some right, title, or interest in said land; the precise right or interest, or by what right they claim such interest, is unknown to plaintiff.

Plaintiff further alleges that the defendants Mary McBee, Henry C. McBee, and Rosa McBee are minor heirs of Geo. McBee, deceased, and all under the age of fourteen years, and concludes with prayer for a decree opening and modifying the decree of divorce of June 13, 1866, so as to give her one undivided one third of said real property, for general relief and costs.

The defendant William Fliedner demurred on the ground that said amended complaint did not state facts sufficient to constitute a cause of suit.

Defendants Gird, Osborn, and Holder also filed a demurrer jointly, setting forth the following grounds:

1. The court has no jurisdiction of the subject-matter of the suit.
2. The suit has not been commenced within the time limited by the code.
3. Several causes of suit have been improperly united.
4. The complaint does not state facts sufficient to constitute a cause of action.
5. There is no equity in the bill.

Both demurrs were argued together, before the circuit court for Benton county, April term, 1880, and sustained by the court.

From this ruling and judgment of the court below, the plaintiff brings this appeal. The questions to be decided

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upon the appeal are such as arise upon the demurrers to the amended complaint.

The demurrer of defendant, William Fliedner, is general, and raises the question whether the facts stated in the complaint constitute any cause of suit against him. The only allegation in the complaint in regard to Fliedner is, that he is "in possession of, and claims to have some interest in said lots, as owner thereof."

In any view of the case, this allegation as to Fliedner is wholly insufficient. The plaintiff claims a right to only one third of the real estate alleged to be in Fliedner's possession, and his being in possession, and claiming an interest as owner thereof, does not necessarily make his possession and claim adverse to the plaintiff's claim. For aught that appears in the complaint, his possession and claim are entirely consistent with a full recognition on his part of all the rights claimed by plaintiff in the premises. There was no error in the ruling of the court below in sustaining this demurrer.

The first issue made by the joint demurrer of Gird, Osborn, and Holder, is upon the jurisdiction of the court over the subject-matter of the suit.

Conceding, for the sake of argument, that plaintiff had a right to an undivided one third of the real estate described in her complaint, upon obtaining her decree of divorce, June 13, 1866, which did not vest in her at that time by reason of an omission in that decree, it does not follow that she must get that decree opened and modified or extended, in order to obtain the title in fee to such part. On the contrary, she could bring an original and independent suit in the circuit court for the county where the land is situated, to enforce her right to the same, and she could not properly commence it anywhere else. (*Godey v. Godey*, 39 Cal. 161; *Whetstone v. Coffee*, 48 Tex. 269; Civil Code, secs. 376, 383, sub. 3.)

The suit, having been commenced in the circuit court for Jackson county, was commenced in the wrong county, but its change to Benton county, before answer, we think ob-

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viated the objection. (Civil Code, sec. 384.) We think this section was intended to cover just such cases as this.

The second ground of demurrer, that the suit was not commenced within the time limited by the code, is not tenable. The complaint was filed October 14, 1879, and it does not appear on its face that it was not commenced within the time limited by the code. (Civil Code, sec. 66, sub. 7; Session Laws 1878, p. 21.)

The third ground of error is that several causes of suit have been improperly united. The plaintiff seeks by this suit to obtain a title in fee to one third part of the lands described in the complaint, from the defendant, Albert Bethel, and at the same time to have the adverse claims of the other defendants to the same annulled and declared void as against her. This is the evident purpose of the suit, whether the complaint is sufficient or otherwise. Her cause of suit against Bethel is her right to this one third which the statute gave her when she obtained her divorce from him, and her cause of suit against the other defendants, their adverse claims or interests in derogation of that right. Whether there is sufficient stated in the complaint to show these causes valid, is not a question here, but supposing there is, are they improperly united? We think not, and that the objection can not be maintained. (Civil Code, sec. 380.)

The fourth and fifth grounds assigned by the demurrer, that "the complaint does not state facts sufficient to constitute a cause of suit," and that there is "no equity in the bill," we deem well taken.

The complaint itself shows that the deed of Holder to Gird of January 14, 1861, was made after Holder had ceased to have any interest in the land, and that Gird well knew it, and that at the time the decree of divorce was granted on June 13, 1866, the defendant, Alfred Bethel, himself was the owner of this same land as he was at the date of the deed from Holder to Gird. It does not appear from the complaint that either Holder or Gird, at the time of that decree, or at any time since, has held, or claims to hold, any interest in said land adverse to plaintiffs' alleged

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right, or that they interfered with the property in any manner whatever.

If Bethel was the owner of this property on June 13, 1866, as alleged, we can not perceive how the previous transactions between Holder, Gird, and Bethel, disconnected from everything subsequent to the decree, can possibly, in any view of the case, affect the alleged rights of plaintiff in this suit.

The alleged fraudulent transactions between these parties took place over four years previous to the decree of divorce, and over four years before the right sued for was given by the legislature, and at a time, so far as the complaint shows, when no divorce was contemplated. As to Osborn, he is merely charged in the same allegation with Fliedner with being in possession of the city lots, claiming some interest therein as owner thereof, which we have already held to be insufficient.

Again, if the peculiar circumstances of this case made it necessary for plaintiff to get the decree of divorce opened up, in order to reach the right she claims in this suit, which we hold was not the case, her complaint shows on its face such laches as would bar her suit.

She states in her complaint sufficient knowledge on her part, at the time she obtained her divorce, of the condition of this property, to have put her on inquiry at once, and yet the complaint does not show that she made any effort at all at that time or since, until the commencement of this suit, over thirteen years afterwards, to discover the actual condition of said property, nor does the complaint show when she did obtain this information. The inquiry was not apparently of so difficult a character as to justify such unreasonable delay in one who had some knowledge of the matter from the first. The case in 4 Or. 30, is in point on this question of laches.

Upon the whole we are satisfied there was no error in the court below in sustaining the demurrers, and that the judgment should be affirmed.

Judgment is affirmed.

Opinion of the Court—Watson, J.

**JOHN WEISS, APPELLANT, v. THE BOARD OF COUNTY
COMMISSIONERS OF JACKSON COUNTY, AND
HENRY G. YOUNG, RESPONDENTS.**

THE SERVICE OF NOTICE OF APPEAL must precede the filing of the undertaking therefor, and simply refile the undertaking, after the notice of appeal has been served, will not answer.

APPEAL from Douglas County. The facts are stated in the opinion.

B. F. Dowell, for appellant.

A. C. Jones, for respondent.

By the Court, WATSON, J.:

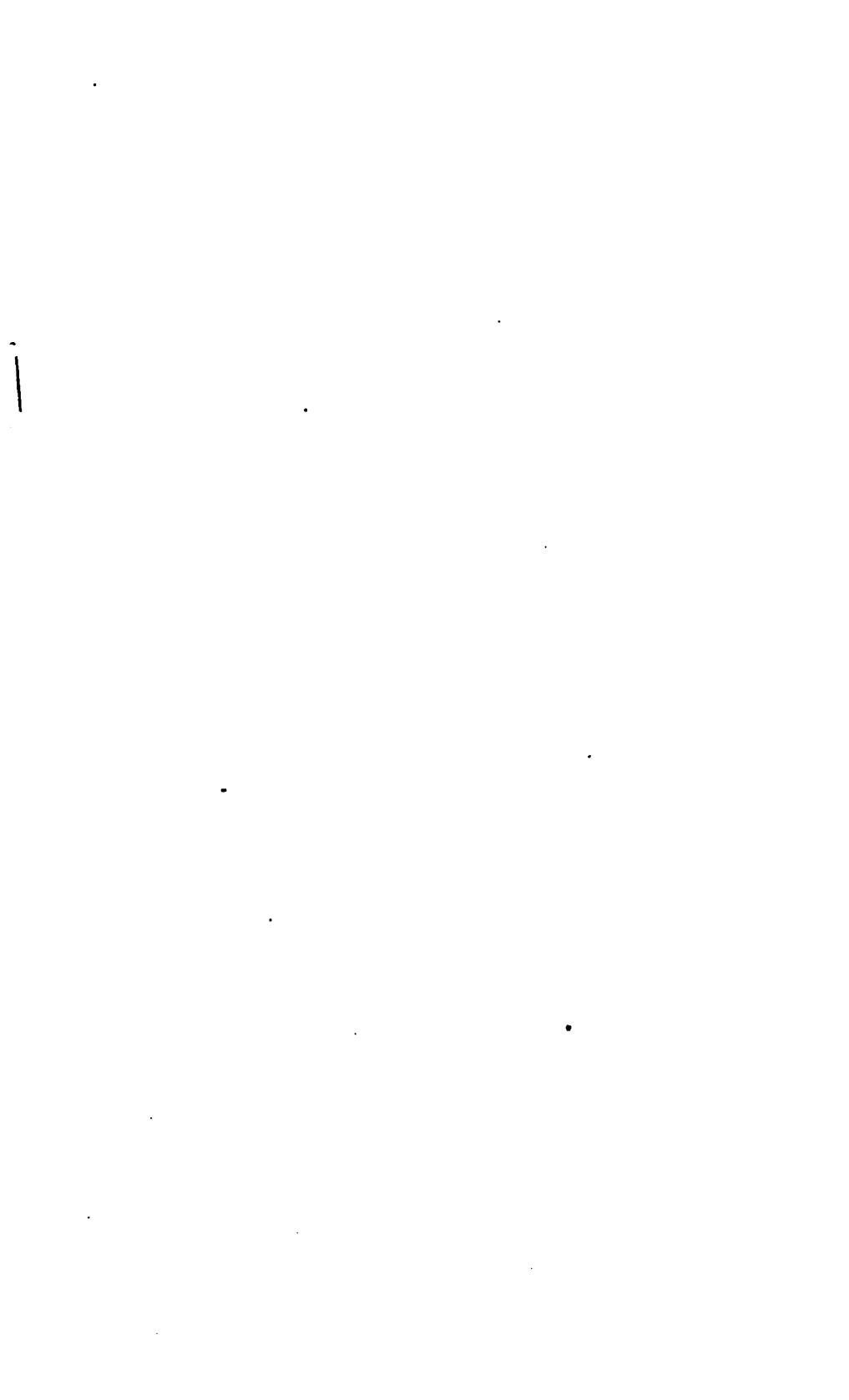
A motion has been made in this case to dismiss the appeal upon the grounds: 1. That the notice of appeal does not sufficiently describe the decree appealed from; 2. That the undertaking for appeal, as shown by the transcript, was not filed within ten days after service of the notice of appeal, but previous to such service, and consequently there is no undertaking for this appeal. In opposition to this motion, appellant has filed his cross-motion, asking leave to file said undertaking, or file a new one.

In our opinion the notice of appeal is sufficient in the particular objected to by the respondents. The date and character of the decree, and the parties in whose favor rendered, are all set forth in the notice, and fully identify it. (*Lewis v. Lewis*, 4 Or. 210.)

The objections to the undertaking are, however, well taken. The service of the notice must precede the filing of the undertaking for an appeal. (*Dooling v. Moore*, 19 Cal. 81; *Buckholder v. Byers*, 10 Id. 481.) Nor will refile of the undertaking now, if that were possible, aid this appeal. But as it satisfactorily appears that appellant has given his notice of appeal in good faith, and that he has failed, through mistake, to file an undertaking within the time allowed by law, the motion to dismiss will be denied, and the appellant has leave to file a sufficient undertaking for appeal.



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consent it was arranged between them that she come to Oregon, at which place the marriage should be consummated, and with that understanding respondent did come to Oregon, and was then ready and willing to marry him, married a third person, then the respondent was entitled to recover without first showing any request to offer to marry appellant. *Id.*

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1. **CONSTITUTIONAL PROVISION CONSTRUED—BANKS MAY BE INCORPORATED.**—Section 1, article 11, of the constitution of Oregon does not prohibit the establishment or incorporation of banks, excepting only banks and moneyed institutions with the privilege of making, issuing, and putting in circulation bills, checks, certificates, promissory notes, etc., to circulate as money. *State v. Hibernia etc. Association*, 396.
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2. **FORFEITURE OF, BY EMPLOYING PROHIBITED LABORERS.**—Where the statute declares that the employment of certain laborers on the public works shall render null and void a contract by a contractor with a municipal corporation, such contract is forfeited by the contractor on the doing the unlawful act, and the corporation may disregard the contract without resorting to a court of equity to annul the contract. *City of Portland v. Baker*, 356.
3. **PROMISE TO PAY FOR SERVICES OF PAUPER NOT IMPLIED.**—Where service has been performed by a relative, or by a person who is a pauper or in indigent circumstances, the law will not imply a promise to pay for such service, but an *express* hiring must be *proved* in order to support a claim for wages. *Bennett v. Stephen*, 444.
4. **AGREEMENT FOR WAGES PENDING GRATUITOUS SERVICE, WHAT WILL CONSTITUTE.**—B., while a minor, entered the service of S. as a member of his family, with the understanding that she was not to have pay for such service; but subsequently she expressed dissatisfaction to S. that she was not receiving pay for her services; whereupon S. told her “he would pay her for her work.” *Held*, that this constituted an understanding or agreement of hiring, and that B. was entitled to recover their reasonable value for services thereafter rendered, notwithstanding the agreement under which the services were originally begun. *Id.*

BY PUTATIVE FATHER TO SUPPORT BASTARD child, void, for want of consideration. See *Nine v. Starr*, 49.

BREACH OF PROMISE OF MARRIAGE, sufficiency of complaint in action for, and request to marry unnecessary, when. See *Lahey v. Knott*, 198.

MORAL OBLIGATION NOT SUFFICIENT CONSIDERATION to support express contract. See *Nine v. Starr*, 49.

EXTENDING TIME OF PAYMENT, WHEN VOID for want of consideration, as to surety. See *Findley v. Hill*, 247.

PAROL AGREEMENT FOR DIVISION OF STREAM may be enforced in equity, when. See *Coffman v. Robbines*, 278.

See **COMPOSITION AGREEMENT.**

CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE.**

CONVERSION.

BY SHERIFF OF MONEY COLLECTED FOR TAXES, evidence of. See *State v. Dale*, 229.

ALLEGATION OF OWNERSHIP in action for, necessity of. See *Johnson v. Oregon Steam Navigation Co.*, 35.

CONVEYANCES.

See DEEDS; FRAUDULENT CONVEYANCES.

CORONERS.

1. FEES OF, FOR SUMMONING JURY.—Where, in a statement of expenses of a coroner's inquest, returned by the coroner to the county court, said coroner has charged five dollars for summoning a jury, the court may, in its discretion, allow a less sum. *Cook v. Multnomah Co.*, 170.
2. IDEM—COUNTY COURT MAY ALLOW IN ITS DISCRETION.—No fee is fixed by the statute for the coroner for summoning a jury of inquest. The county court may fix the compensation in such case. The finding and order of such county court, in such a case, is not the subject of a writ of review. *Id.*

CORPORATIONS.

1. SUBSCRIPTION TO STOCK.—Articles were filed, under the general incorporation law, to incorporate the Oregon Central Railroad Company, with a capital stock of seven million two hundred and fifty thousand dollars, divided into seventy-two thousand five hundred shares of one hundred dollars each. Six different persons subscribed one share each, when one of them, in behalf of the corporation, made a subscription in the following words: "Oregon Central Railroad Company, by G. L. Woods, chairman, seventy thousand shares, seven million dollars;" *Held*, that this subscription for the company was a nullity, and that those who had subscribed the six shares could not lawfully elect a board of directors and organize the corporation, and that a board of directors elected by them could not lawfully transact business for the corporation: *Holladay v. Elliott*, 84.
2. POWER OF DIRECTORS—FUTURE PROFITS.—In forming a corporation under the statutes of Oregon, it is the province of the corporation to perfect the corporation by opening stock books and obtaining subscribers to the capital stock. The corporators have no power to make regulations which shall bind the action of the directors in disposing of the future profits of the corporation, except so far as the same are regulated in the articles of incorporation. *Coyote etc. Mining Co. v. Ruble*, 284.
3. FUTURE, PROPERTY HELD FOR.—The corporators may receive and hold property for the use of the corporation to be formed by them. *Id.*
4. STOCKHOLDER.—A person may be a corporator who is not a stockholder. *Id.*
5. RECORDS ONLY EVIDENCE.—The proceedings of a corporation must be shown by its records. *Id.*
6. ASSESSMENT, LIABILITY FOR.—To make a stockholder liable to pay an assessment on his stock, the assessment must be made by the directors, which must be proved by the records of the corporation. *Id.*

7. STOCKHOLDERS' AGREEMENT.—Agreements made by the stockholders of a corporation before it is organized by electing directors, to become binding must be adopted or agreed to by the corporation or the directors thereof after it is organized. *Id.*
8. STOCK MUST BE SUBSCRIBED.—The stock to a corporation necessary to its organization must be subscribed before the corporation can be legally organized. *Id.*
9. SUBSCRIPTIONS, HOW MADE—EXPRESS AUTHORITY.—To render a person liable as a stockholder to a corporation, he must sign his name to the subscription of stock, or authorize an agent to do it for him, and this authority must be express, and not implied. *Id.*
10. ORIGINAL STOCKHOLDERS—ESTOPPEL.—All original stockholders are only made liable on their subscriptions for stock by a writing, and are all equal before the law, and there is no estoppel between them. *Id.*
11. DIRECTORS.—Papers and agreements made by persons contemplating becoming stockholders to a corporation before an organization, and not intended to be subscriptions to stock, and relating to the future management of the corporation, do not give authority to the secretary of the corporation to place the names of the persons who subscribed such papers and agreements in the list of stockholders on the stock book. *Id.*
12. NOTICE TO STOCKHOLDERS—ESTOPPEL.—In an action by a corporation to recover a subscription to stock, the conditions of the subscription may be inquired into, for both parties are chargeable with notice of such conditions, and there is no estoppel. *Id.*
13. STOCKHOLDER REQUIRED TO CONVEY TO COMPANY, WHEN.—Where R. purchased with his own money certain mining claims, with the understanding that he would transfer the same to a company, of which he was one, which company was to own these claims, with other claims, which were to be worked together, it being necessary to so work them to secure water-rights to make the whole valuable; and R., after securing in his own name claims which, if held by him in severalty, would greatly injure the other claims of the company, may be required to convey to the company, on being tendered to him the money he paid for such claims. *Id.*

BANKS MAY BE INCORPORATED UNDER THE CONSTITUTION, except for issuing bills, etc., to circulate as money. See *State v. Hibernia etc. Association*, 396.

APPROPRIATION OF PART OF PUBLIC ROAD BY, for toll road, with or without agreement with county court, when valid, and effect of. See *Douglas County Road Co. v. Canyonville etc. Road Co.*, 102; *Id.* 263.

See FOREIGN CORPORATIONS, FRANCHISE.

CO-TENANCY.

IN CROP between landlord and tenant exists, when. See *Cooper v. McGrew*, 327.

COUNSEL.

ASSUMPTION BY, OF FACTS NOT PROVED, is error sufficient to reverse judgment, when. See *Tenny v. Mulvaney*, 513.

COUNTY COURT.

1. WRIT OF REVIEW LIES TO CORRECT ERRORS OF, IN COUNTY BUSINESS.— Under section 875 of the code, no appeal lies from the decisions of the county court in the transaction of county business, but such decisions may be reviewed upon writ of review. *Mountain v. Multnomah Co.*, 470.
2. MILITIA COMPANIES—DUTY OF COUNTY COURT TO PROVIDE ARMORY.— It is the duty of the county court of each county in which there shall be an organized volunteer company, upon application to the commanding officer thereof, to provide an armory and armorer, and to audit, allow, and cause to be paid the necessary expense of the same to an amount not exceeding fifty dollars per month; and if the county court shall refuse so to do, its proceedings may be reviewed, by writ of review, as provided for in the code. *Id.*

HAS DISCRETION AS TO ALLOWANCE OF CORONER'S FEES for summoning jury, and decision not reviewable. See *Cook v. Multnomah Co.*, 170.

MAY AGREE TO APPROPRIATION OF PART OF PUBLIC ROAD by a corporation. See *Douglas County Road Co. v. Canyonville etc. Road Co.*, 102.

POWER OF, TO AWARD DAMAGES WHERE MATERIALS for repairing public roads taken from one's land. See *Kendall v. Post*, 141.

JURISDICTION OF, OVER DISTRIBUTION OF PERSONALTY of decedents, exclusive, and ante-nuptial agreement affecting such distribution should be proved before. See *Winkle v. Winkle*, 193.

ORDERS OF, IN SETTLEMENT OF ESTATES, final, if duly made and not appealed from, and no relief in equity. *Id.*

COURT.

DISCRETION OF, AS TO ADMITTING EVIDENCE which counsel undertakes to render material. See *Bennett v. Stephens*, 444.

DISCRETION OF, as to motions for new trial. See *State v. McDonald*, 113.

DISCRETION OF, AS TO PERMITTING WITHDRAWAL OF QUESTIONS submitted to obtain special findings. See *Rohr v. Isaac*, 451.

FINDINGS ON TRIAL BY regarded as a verdict. See *Hallock v. City of Portland*, 29.

See COUNTY COURT; JUSTICES OF THE PEACE; BOARD OF SCHOOL LAND COMMISSIONERS.

COVENANTS.

IN DEED, ESTOPPEL BY. See *Bayley v. McCoy*, 259.

CRIMINAL LAW.

1. ACCOMPLICE, TESTIMONY OF.—In a criminal case the testimony of an accomplice is not alone sufficient to warrant a conviction. *State v. Odell*, 30.
2. IDEM—CORROBORATING TESTIMONY.—Proof that the prisoner was in the same town about the time of the alleged commission of the crime is not alone sufficient to corroborate the testimony of an accomplice and warrant a conviction, and it is the duty of the court to so instruct the jury when asked to do so by the defendant. *Id.*

3. **HOMICIDE—VIEW OF PREMISES BY JURY—PRESENCE OF DEFENDANT—WAIVER.**—Where, on a trial for murder in the first degree, the court, upon the application of the state, directed a view of the place of the alleged killing by the jury: *Held*, that the omission by the court to provide for the presence of the defendant or his counsel at the view, no application therefor having been made by the defendant or his counsel at the time the view was ordered, was not error. *State v. Ah Lee*, 214.
4. **DELIBERATION AND PREMEDITATION—INFERENCE FROM FACTS.**—Direct proof of deliberation and premeditation is not required, but may be inferred from proven facts. Three men, all armed with deadly weapons, made a simultaneous attack upon a third, in a Chinese Joss-house, and killed him, one having approached the deceased from behind, and without saying a word, struck him a deadly blow on the head with a hatchet, while the others fired two shots into his body in rapid succession: *Held*, that these facts warranted the jury in concluding that the killing was preconcerted, and that the design to take the life of the deceased was formed in cool blood. *Id.*
5. **INDICTMENT—DISTINCT CRIMINAL ACTS.**—Where the statute makes the commission of different acts a crime, and uses the word *or* connecting these acts, an indictment is good which charges the defendant with the commission of more than one of such acts, using the conjunction *and* to connect them in the indictment. *State v. Dale*, 229.
6. **CONVERSION OF PUBLIC MONEY IS LARCENY.**—Money collected by a sheriff for taxes is the property of the county in the hands of the sheriff, and he may be guilty of larceny by converting the same to his own use. *Id.*
7. **LARCENY OF DIFFERENT ARTICLES, ONE OFFENSE.**—Where a person is charged with the larceny of a horse, saddle, and bridle, taken at the same time and place, and from the same person, the whole transaction constitutes but *one crime*, and but *one* indictment can be sustained for such taking, and if the prosecution see proper to split up the transaction into two offenses, by causing two indictments against such person for that which is but one crime, a conviction or acquittal on one may be pleaded as a bar to a subsequent prosecution on the other. *State v. McCormack*, 236.
8. **IDEA.—**—When a man has done a criminal act the prosecutor may carve as large an offense out of the transaction as he can, yet he must cut only once. *Id.*
9. **LARCENY—MONEY PAID BY MISTAKE.**—One who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud the owner thereof, is guilty of larceny. *State v. Ducker*, 394.

CROP.

LANDLORD AND TENANT ARE CO-TENANTS in, when. See *Cooper v. McGrew*, 327.

CUSTOM.

PROOF OF, WHEN REQUIRED.—Where a plaintiff alleges a right to appropriate water under a local custom, and such allegation is denied, the plaintiff must prove such custom and a compliance therewith. The court does

not take judicial knowledge of local customs concerning water rights. To claim and hold water appropriated under a local custom, such as is recognized by the act of congress of the twenty-sixth day of July, 1866, the claimant must allege and prove a custom such as is named in said act. *Lewis v. McClure*, 273.

DEBTOR AND CREDITOR.

See ASSIGNMENTS, COMPOSITION AGREEMENT.

DECLARATIONS.

OF DECEASED PERSONS CONCERNING PEDIGREE, when admissible. See *Thompson v. Woolf*, 454.

DEEDS.

1. MISTAKE IN, GRANTOR MUST BE PARTY TO.—In order to show a mistake in a deed, it must be shown that the grantor was a party to the mistake. *Remillard v. Prescott*, 37.
2. IDEM—DEGREE OF PROOF.—In order to establish a mistake in a deed, it is necessary that the mistake be shown by clear and convincing proof, since the evidence must overcome the strong presumption existing in favor of written instruments, which should not be annulled by uncertain and contradictory testimony. *Id.*
3. RESERVATION IN.—Where a person owning a tract of land sells a portion thereof which is surrounded by his other lands, and describes the lands conveyed by metes and bounds, and then excepts a strip included in these bounds off of three sides of the land so described, for a road: *Held*, that the fee passes by the deed subject to the right of way for a road. *Abraham v. Abbott*, 53.
4. UNDUE INFLUENCE MUST BE CLEARLY SHOWN TO SET CONVEYANCE ASIDE.—In order to warrant a court of equity in setting aside a deed alleged to have been executed under undue influence, exercised by the grantee over the grantor, the evidence must clearly establish that such influence was exerted, and that the deed was executed by reason of such influence, and would not have been executed had not the influence been exerted, and that the deed was not the free act of the grantor. *Biglow v. Leabo*, 147.
5. Two CONVEYANCES EXECUTED AT THE SAME TIME between the same parties, and relating to the same subject-matter, should be construed together as forming parts of a single conveyance. *Kruse v. Prindle*, 158.
6. RESERVATION OF WHARF, PRIVILEGES IN, WHERE LAND BOUNDED ON TIDE WATER.—Where, in a conveyance of a lot bounded on tide water, the grantor reserves all privileges around said lot, it is a reservation of the right of wharfing. *Parker v. Rogers*, 183.
7. MISTAKE IN MUST BE MUTUAL.—A mistake in a deed or written instrument will not be corrected and reformed, unless the mistake is shown to be mutual and clearly proven by satisfactory evidence. *McCoy v. Bayley*, 196.
8. RIGHT OF WAY TO FLOW WATER—GRANT CONSTRUED.—Where S. granted to C. all the water in a certain creek, and the right to convey such water over the land of S. to the land of C., and granted to C. the right "to

enter upon lot one (land of S.), and build, maintain, repair, and keep up and in operation, all claims, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of said C.," such conveyance gives to C. the right to construct several canals or courses for the water over said premises of S. *Spear v. Cook*, 380.

9. **IDEML**.—By such conveyance, the grantee has the right to convey all the water, and at different times and places. *Id.*
10. **IDEML**.—Such grantee may first construct a ditch and take part of the water, and afterwards construct another ditch to convey the balance, or enlarge the first ditch. *Id.*
11. **IDEML**.—Such grantee may also change his ditch when located, if such change is necessary to enable him to convey the water in a convenient and reasonable manner. *Id.*
12. **IDEML**—**RIGHT TO FLOAT WOOD.**—Such grantee may also float wood through his ditch, provided he does not thereby injure the grantor. *Id.*

DEEDS RECITED IN CONVEYANCE TO PLAINTIFF, in ejectment, admissible on part of defendant. See *Phillippi v. Thompson*, 428.

ESTOPPEL BY RECITALS, admissions or covenants in exists, when. See *Bayley v. McCoy*, 259.

DENIALS.

ON INFORMATION AND BELIEF sufficient, when. See *Sherman v. Osborn*, 66.

DIVORCE.

See **MARRIAGE AND DIVORCE**.

DONATION ACT.

1. **FINAL PROOF UNDER—DOWER.**—The widow of a donee holding under the fourth section of the donation act, when such donee dies before final proof is made, is entitled to dower in her husband's half of the claim. *Love v. Love*, 23.
2. **HUSBAND'S ESTATE, HOW DESCENDS.**—When such donee dies after four years' residence and cultivation, but before final proof is made, his widow is entitled to an equal portion with the children or heirs of the deceased, in fee, and to dower in the remaining portion which descends to the children or heirs. *Id.*
3. **BOND FOR DEED MADE PRIOR TO PASSAGE OF ACT.**—A bond for a deed to land, made prior to September 27, 1850, can be enforced against the obligee after he obtains a patent from the United States under the act of September 27, 1850. *Parker v. Rogers*, 183.

DOWER.

WIDOW NOT IMMEDIATELY ENTITLED TO THIRD OF RENTS AND PROFITS.—A widow is not entitled, immediately on the death of her husband, to receive one third of the rents and profits of the lands of which he was the owner and died seized, in right of her dower interest therein, but the executor or administrator of the estate is entitled to the possession and control of the same, and to receive the rents and profits thereof, to be applied to the satisfaction of claims against the estate. *Leonard v. Grant*, 276.

UNDER DONATION ACT, where husband dies before final proof, widow entitled to. See *Love v. Love*, 23.

DRUNKENNESS.

IS NOT CONTRIBUTORY NEGLIGENCE, when. See *Davis v. Oregon & California R. R. Co.*, 172.

DYING DECLARATIONS.

BELIEF IN CHRISTIANITY UNNECESSARY to render admissible. See *State v. Ah Lee*, 214.

EASEMENTS.

GRANT OF RIGHT OF WAY TO FLOW WATER across land, construction and effect of. See *Spear v. Cook*, 380.

GRANT OF RIGHT OF WAY FOR MILL RACE is, and how construed. See *Miller v. Vaughn*, 333.

EJECTMENT.

1. TITLE MUST BE PLEADED IN.—In an action of ejectment, where the defendant merely traverses the allegations in the complaint, and does not set up title in himself or another, the defendant will be confined in his testimony to such facts only as tend to show the weakness of the plaintiff's title. *Phillippi v. Thompson*, 428.

2. IDEM—EVIDENCE.—Where the plaintiff in his evidence produces a confirmatory deed to establish his title, in which is recited other deeds by their dates, through which plaintiff derives title, it is competent for defendant to offer in evidence and produce these deeds recited to show the boundaries of the land claimed by the plaintiff. Id.

JUDGMENT IN, CONCLUSIVE AS TO TITLE AND RIGHT OF POSSESSION. See *Hill v. Cooper*, 254.

ELECTIONS.

1. A BALLOT WRITTEN OR PRINTED ON COLORED PAPER IS ILLEGAL, and should be rejected at any election held under the general laws of this state. *State v. McKinnon*, 493.

2. IN CASE OF A TIE THERE IS NO ELECTION.—Where, at an election held under the laws of this state, two or more candidates receive the highest and an equal number of votes for the same office, neither is elected, nor can either rightfully exercise the duties of such office until the matter has been decided by lot, and he has been declared duly elected in the manner provided in the code. Id.

IN MUNICIPAL CORPORATIONS, JURISDICTION AS TO CONTESTS IN, of board of trustees, not exclusive, when. See *State v. McKinnon*, 493.

EQUITY.

SUIT TO QUIET TITLE IN WILD LAND.—One owning wild lands which he holds by deed from one seized by deed, is in such possession as to enable him to bring a suit in equity to remove a cloud from the title, under section 500 of the code. *Thompson v. Woolf*, 454.

COURT OF, WILL NOT RESTRAIN ROAD SUPERVISOR from taking materials to repair roads, except in case of oppression. See *Kendall v. Post*, 141.

SUIT IN, TO RECOVER REJECTED CLAIM AGAINST NEXT OF KIN, after final settlement, not maintainable, when. See *Grange Union v. Burkhart*, 51. **NO RELIEF IN, AGAINST FINAL ORDER OF COUNTY COURT** in distribution of estates, when. See *Winkle v. Winkle*, 193.

PAROL AGREEMENT FOR DIVISION OF STREAM, when enforced in. See *Coffman v. Robbins*, 278.

See **INJUNCTIONS**.

ERROR.

ASSUMING FACTS NOT IN EVIDENCE.—It is error sufficient to reverse a judgment to permit counsel to state, against objection, facts not in evidence and pertinent to the issue, or to assume, *arguendo*, such facts to be in the case when they are not. *Tenny v. Mulvaney*, 513.

NOT ASSIGNED IN NOTICE OF APPEAL, not considered. See *State v. McKinnon*, 487.

JUDGMENT AGAINST ONE-JOINT WRONG-DOER is, when. See *Cauthorn v. King*, 138.

ADMISSION OF SLIGHT EVIDENCE of fact in issue is not. See *Elkins v. Parish*, 330.

ALLOWING REPLY TO BE FILED ON AN APPEAL from a justice's court is not, when. See *Rohr v. Isaacs*, 451.

OMISSION TO GIVE INSTRUCTIONS as to matters pertinent is not, when. See *Page v. Finley*, 45.

REFUSAL TO PERMIT ANSWERS to questions not pertinent is not. See *Lahey v. Knott*, 198.

ESTATES OF DECEASED PERSONS.

1. **FINAL SETTLEMENT OF ESTATE—REJECTED CLAIM**.—Where one having a claim against the estate of a deceased person presented it to the administrator, for allowance, and it was rejected by him, and no action was afterwards commenced by the claimant against the administrator to establish its validity, the holder thereof can not, after the final settlement of the administration accounts, maintain a suit in equity to recover the claim from the next of kin of the deceased person out of any distributive share which he may have received. *Grange Union v. Burkhart*, 51.

2. **ADMINISTRATION — JURISDICTION OF COUNTY COURT — DISTRIBUTION OF PERSONAL PROPERTY**.—The county court has exclusive jurisdiction over the distribution of the personal property of deceased persons, and if there be an antenuptial contract which affects such property, it should be proved before such court, and the rights of the parties thereunder determined by such county court. *Winkle v. Winkle*, 193.

3. **IDEM—ORDERS FINAL, WHEN**.—If parties interested in the estate do not appeal from orders of the county court, duly made, such orders become final, and can not be inquired into in a court of equity. *Id.*

ESTOPPEL.

1. **MUST BE PLEADED**.—An estoppel, to be relied upon, must be pleaded where there is an opportunity to plead it. *Remillard v. Prescott*, 37.

2. **BY RECITALS, ADMISSIONS, OR COVENANTS IN DEED**.—Where it distinctly appears in a deed of conveyance of real estate, either by recital, an ad-

mission, a covenant, or otherwise, that the parties actually intended to convey and receive reciprocally a certain estate, they will be estopped from denying the operation of the deed according to this intent. *Bayley v. McCoy*, 259.

BETWEEN STOCKHOLDERS OF CORPORATION no estoppel exists, and conditions of subscription may be inquired into. See *Coyote etc. Mining Co. v. Ruble*, 284.

EVIDENCE.

1. **AS TO PURCHASE PRICE OF HORSES KILLED BY RAILROAD, IMMATERIAL.**—In an action to recover the value of horses killed by a railroad, the plaintiff, testifying as to the value of the horses, stated on cross-examination that he bought and paid for them in sheep at a stated price. The defendant then asked where he got the sheep, how much he paid for them, and whether they had been sheared: *Held*, that such questions were irrelevant. *Holstine v. O. & C. R. R. Co.*, 163.
2. **DYING DECLARATIONS—BELIEF IN THE CHRISTIAN RELIGION.**—In order to render dying declarations admissible, it is not requisite that the deceased should have been a believer in the Christian religion at the time the declarations were made. *State v. Ah Lee*, 214.
3. **COPY OF LOST INSTRUMENT—QUESTIONS FOR JURY.**—Where an instrument in writing is pleaded as a defense in an answer, and the making of the instrument is denied in the replication and on the trial, the original having been proven to be lost, a pretended copy produced and sworn to by two witnesses as a true copy, and the plaintiff's offer evidence tending to prove that no contract was executed, it is a question for the jury whether the paper produced is a copy of the lost paper, and whether it was executed between the parties. *Rosendorf v. Hirschberg*, 240.
4. **SLIGHT, TENDING TO PROVE FACT IN ISSUE, ADMISSIBLE.**—Where there are several issues of fact made by the pleadings to be tried by a jury, it is not error to admit any evidence, however slight, which tends to prove any fact so put in issue. *Elkins v. Parrish*, 330.
5. **PEDIGREE—DECLARATIONS OF DECEASED PERSONS.**—Declarations of deceased person or persons out of the state, who were or are relatives of a family, may be received as evidence of pedigree. But before such declarations can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations. *Thompson v. Woolf*, 454.
6. **INADMISSIBLE QUESTION.**—Where the contract provided for the delivery of good, sound, merchantable logs, to be cut from standing timber within a mile from a certain creek, and there was evidence showing that the logs were cut within a fourth of a mile from said creek, and that where the logs were cut the timber was inferior, and a great many trees were rotten; *Held*, that the question, "Are these average logs on the ground where they were cut?" was inadmissible. *Tenny v. Mulvaney*, 513.
7. **IDEM.**—Where a witness was asked the question, "Are these as good logs as other logs on the creek?" and there was no evidence showing the kind or quality of the other logs on the creek, or what particular other logs on the creek were referred to; *Held*, that the question assumed a

fact which it was the object of the question to prove, and was incompetent. *Id.*

NOT PRODUCED IN LOWER COURT, not considered on appeal. See *Bentley v. Jones*, 47.

OF REQUEST TO MARRY, in action for breach of promise, unnecessary, when. See *Lahey v. Knott*, 198.

AFFIDAVIT IN PROCEEDING FOR CONTEMPT is, and not a pleading. See *State v. McKinnon*, 487.

ACCOMPLICE, TESTIMONY OF, in criminal case, must be corroborated. See *State v. Odell*, 30.

IDEM.—What not sufficient corroboration of. *Id.*

OF DELIBERATION AND PREMEDITATION on indictments for murder, what circumstances are sufficient. See *State v. Ah Lee*, 214.

PROOF OF LOCAL CUSTOM concerning water rights required. See *Lewis v. McClure*, 273.

IN EJECTMENT, on part of defendant, of deeds recited in conveyance to plaintiff, admissible. See *Phillippi v. Thompson*, 428.

OF PRIOR ACCIDENT IN ACTION FOR NEGLIGENCE against railroad inadmissible, when. See *Davis v. Oregon & California R. R. Co.*, 172.

OF COLLUSION IN FILING BILL OF INTERPLEADER inadmissible after order to interplead, when. See *Fahie v. Lindsay*, 474.

EXPERT TESTIMONY INADMISSIBLE IN SUITS BETWEEN PARTNERS in ascertaining profits. See *Boire v. McGinn*, 466.

ENTRIES IN PARTNERSHIP BOOKS *prima facie* evidence between parties, but may be overcome. *Id.*

OF CONVERSION BY SHERIFF of money received for taxes, what competent. See *State v. Dale*, 229.

EXTRANEOUS ORAL, IN CONSTRUING WILL, admissibility of. See *Moreland v. Brady*, 303.

See WITNESSES.

EXECUTIONS.

1. A PURCHASE AT AN EXECUTION SALE by a sheriff, depends upon the judgment, the levy, and deed. All other questions are between the parties to the judgment and the sheriff. *McRae v. Daviner*, 63.
2. SHERIFF'S SALE—ORDER OF CONFIRMATION CONCLUSIVE OF REGULARITY OF SALE.—By sec. 293, subd. 4, of the code, an order confirming a sheriff's sale is a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit, or proceeding whatever. *Id.*
3. DISTRIBUTION OF PROCEEDS, ON RESALE OF PROPERTY.—When a sheriff's sale of real property is set aside by the judgment of the supreme court, and a resale of the premises is ordered, such resale must be made in conformity with sec. 293, subd. 3 and 4, on page 169 of the code. And if, upon such resale, the property shall be sold to any person other than the former purchaser, the court must first repay the former purchaser the amount of his bid, out of the proceeds of the resale. *Trullinger v. Kofoed*, 436.

MAY BE RECALLED AFTER APPEAL and stay of proceedings, on motion. See *Bentley v. Jones*, 47.

EXECUTORS AND ADMINISTRATORS.

ENTITLED TO POSSESSION AND RENTS AND PROFITS as against widow. See *Leonard v. Grant*, 278.

EXPERTS.

TESTIMONY OF, INADMISSIBLE TO ASCERTAIN PROFITS in suits between partners. See *Boire v. McGinn*, 466.

FEES.

OF CORONER IN SUMMONING JURY, county court has discretion as to allowance of. See *Cook v. Multnomah Co.*, 170.

FERRY.

GRANT OF FRANCHISE FOR, at Portland construed. See *Price v. Knott*, 438. SINGLE, what constitutes. Id.

FINDINGS.

1. ON TRIAL BY THE COURT, HOW REGARDED.—When a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed as a verdict, and may be set aside in the same manner and for the same reasons, as far as applicable, and a new trial granted. *Hallock v. City of Portland*, 29.

2. IDEM—NEW TRIAL, WHEN A MATTER OF DISCRETION.—The refusal to grant a new trial on the ground that the evidence was insufficient to justify the finding of fact, is a matter resting in the sound discretion of the court below, and can not be reviewed on appeal. The findings of fact by the court below must be accepted as correct until set aside in that court. Id.

OF FACT BY REFEREE not reversed unless clearly against evidence. See *Fahie v. Lindsay*, 474.

SPECIAL, BY JURY, questions submitted for may be withdrawn, when. See *Rohr v. Isaac*, 451.

FORECLOSURE.

See MORTGAGES.

FOREIGN CORPORATIONS.

ACT REGULATING DOES NOT INCLUDE THOSE NOT SPECIFIED.—The act of the legislative assembly entitled, "An act to regulate and tax foreign insurance, banking, express, and exchange corporations or associations doing business in the state," can not, under section 20 of article 4 of the constitution, be construed to contain any provision in relation to any foreign corporation other than those expressly specified in the title of the act. *Singer Mfg. Co. v. Graham*, 17.

FRANCHISE.

GRANT OF, STRICTLY CONSTRUED.—The grant of a franchise is to be strictly construed against the grantee, and nothing passes by implication. It is not exclusive unless expressly made so by the grant itself. *Canyonville etc. Road Co. v. Stephenson*, 263.

GRANT OF, FOR PORTLAND FERRY, construed. See *Price v. Knott*, 438.

FRAUD.

IN EFFECTING LOAN TO AVOID TAXATION, what is, effect of, and jurisdiction of board of equalization to try. See *Poppleton v. Yamhill Co.*, 337.

IN ASSIGNMENT for benefit of creditors, *onus* is on creditor impeaching, to show. See *Kruse v. Prindle*, 158.

ALLEGATION OF, must state what. See *Nicolai v. Lyon*, 56.

COMPLAINT CHARGING, is insufficient, when. See *Weiss v. Bethel*, 522.

CONCEALMENT BY A WOMAN AT HER MARRIAGE of her having been the mother of a bastard is not, so as to annul the marriage. See *Smith v. Smith*, 100.

FRAUDULENT CONVEYANCES.

NOT SET ASIDE AT SUIT OF CREDITOR IN TRIFLING SUM.—Where the amount of a creditor's claim was only three dollars and fifty cents: *Held*, that a court of equity would not interfere to set aside a conveyance, alleged to be fraudulent, at the suit of such creditor. *Hamburger v. Grant*, 181.

GUARDIAN.

OF BASTARD CHILD, mother is, and liable for support. See *Nine v. Starr*, 49.

HOMICIDE.

See CRIMINAL LAW, 3, 4.

HUSBAND AND WIFE.

WIFE'S RIGHT IN HUSBAND'S LAND UNDER DONATION ACT where he dies before completing final proof. See *Love v. Love*, 23.

See DOWER, MARRIAGE AND DIVORCE, MARRIED WOMEN.

ILLEGITIMATE CHILD.

See BASTARD CHILD.

INDICTMENT.

FOR DISTINCT CRIMINAL ACTS need not state them disjunctively. See *State v. Dale*, 229.

FOR LARCENY OF DIFFERENT ARTICLES at same time, from same person, only one will lie. See *State v. McCormack*, 236.

INFANTS.

CUSTODY OF, MINOR CHILD UNDER DECREE FOR DIVORCE, father when entitled to. See *Jackson v. Jackson*, 402.

INJUNCTIONS.

1. COMPLAINT MUST SHOW IRREPARABLE INJURY.—To warrant the court in granting an injunction, it must appear from the facts stated in the complaint that the plaintiff will suffer irreparable injury unless the defendant be enjoined; and the allegation in the complaint that the plaintiff will be irreparably injured is not sufficient. Facts must be stated from which the court may judge of the injury and its extent. *City of Portland v. Baker*, 356.

2. **AGAINST GRADING DOWN STREET TO INJURY OF LOT OWNER.**—One owning a lot next to the river may lawfully claim an injunction against a private citizen who threatens to grade down a street next to the river, and adjoining the lot of such owner, if he shows in his complaint that such grading will permanently injure his improvements on said lot, or render its enjoyment less convenient. *Price v. Knott*, 438.

INSTRUCTIONS.

OMISSION TO GIVE, as to matters pertinent, not error, when. See *Page v. Finley*, 45.

NOT PERTINENT, court may refuse to give. See *Rosendorf v. Hirschberg*, 240.

INTERPLEADER.

1. **BILL OF, WHEN PROPER.**—An action was brought in the county court by a husband and wife against the maker of a promissory note payable to the wife, and while the action was pending, the money due upon the note was garnished in the hands of the maker, by certain creditors of the husband, who claimed that the same was the property of the husband, and who alleged that the note was taken in the wife's name to delay and defraud the husband's creditors. *Hell*, that the maker of the note could properly file a bill of interpleader to determine the conflicting claims of the wife, and the garnishing creditors to the money. *Fahie v. Lindsey*, 474.

2. **IDEM—MATTERS AFFECTING THE GOOD FAITH OF THE PLAINTIFF ARE NOT ADMISSIBLE AFTER THE ORDER IS MADE.**—Where the plaintiff in a bill of interpleader stated under oath that there was no collusion between himself and either of the defendants, and an order was made by the court requiring the defendants to interplead with each other, evidence to prove collusion could not be received after the making of such order. *Id.*
By ASSIGNEE under assignment act of 1878, when not authorized. See *Tichenor v. Coggins*, 270.

JOINT OBLIGORS.

RELEASE OF ONE JOINT MAKER of note releases all. See *Crawford v. Roberts*, 324.

JOINT WRONG-DOERS.

JUDGMENT AGAINST ONE ONLY is erroneous on general verdict against all. See *Cauthorn v. King*, 138.

JUDGMENTS.

WHEN AND HOW FAR CONCLUSIVE. See *Barrett v. Failing*, 152.

IN EJECTMENT CONCLUSIVE as to title and right of possession. See *Hill v. Cooper*, 254.

AGAINST PRINCIPAL, SURETY not discharged by, when. See *McCullough v. Hellman*, 191.

JUDICIAL NOTICE.

NOT TAKEN OF LOCAL CUSTOM concerning water-rights. See *Lewis v. McClure*, 273.

ON APPEAL, OF WANT OF JURISDICTION in court below, when taken. See *State v. McKinnon*, 487.

JURISDICTION.

1. **SUMMONS—SERVICE BY PUBLICATION—RECITALS IN DECREE.**—Where the statute in divorce cases required a summons on a non-resident defendant to be published four weeks, as in the act of January 17, 1854, and a decree granting a divorce under it contained a recital in the following words: “And it further appearing that the defendant had been served by publication as required by law,” jurisdiction over the person of the defendant will not be presumed, it appearing by the filing on the complaint that four weeks could not intervene between the time of such filing and the rendition of the decree. *Northcut v. Lemery*, 316.
2. **RECORD MUST SHOW STRICT COMPLIANCE WITH SPECIAL POWER.**—Where a court of general jurisdiction exercises a special power conferred upon it by statute, and not according to the course of the common law, it must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself. *Id.*
WANT OF IN COURT BELOW judicially noticed on appeal. See *State v. McKinnon*, 487.
JUDGE HAS NOT, IN VACATION, TO TRY A CONTEMPT for disobeying judgment or order. *Id.*
OF ELECTION CONTESTS IN MUNICIPAL CORPORATIONS, not exclusive in board of trustees, when. See *State v. McKinnon*, 493.
OF COUNTY COURT AS TO DISTRIBUTION OF PERSONALTY of decedents, and ante-nuptial agreements affecting the same. See *Winkle v. Winkle*, 193.

JURORS.

1. **OBJECTIONS TO A JUROR** on the ground of incompetency are waived by failing to challenge at the proper time. *State v. McDonald*, 113.
2. **CHALLENGE OF—BILL OF EXCEPTIONS MUST SHOW ALL THE EVIDENCE.**—Where the decision of the circuit court on the trial of the challenge of a juror for actual bias is assigned as error, the supreme court will not review such decision, unless it appears in the bill of exceptions that all the evidence adduced on the trial of such challenge in the circuit court is reported to this court. *State v. Tom*, 177.
3. **OBJECTION TO PANEL.**—Where an objection to a juror is that he is drawn from a particular panel, and not that the juror is personally disqualified or improperly summoned, such objection is a challenge to the panel. *State v. Dale*, 229.
4. **REVIEW OF RULING ON CHALLENGE.**—This court will not review the ruling of the court below on a challenge for actual bias in a juror, unless all the evidence upon which that court acted is reported to this court. *Hayden v. Long*, 244.

JURY.

MAY JUDGE AS TO GENUINENESS OF PRETENDED COPY of lost instrument, when. See *Rosendorf v. Hirschberg*, 240.

See SHERIFF'S JURY, VERDICT.

JUSTICES OF THE PEACE.

1. **OMISSION OF JUSTICE TO SWEAR JURY.**—If a justice of the peace, through inadvertence, omits to swear a jury in the trial of an action be-

fore him, and the parties, being present, proceed with the trial of the cause without making any objection to the jury until after judgment is entered on the verdict, it is then too late for the party against whom it is rendered to question its validity, on the ground that the jury was not sworn. *Griffin v. Pitman*, 342.

2. **NEW TRIAL, NO AUTHORITY TO GRANT.**—After a justice of the peace has rendered a judgment, on the verdict of a jury in a case tried before him, he has no authority to set aside such judgment and grant a new trial. *Id.*
3. **ENTERING DEFAULT WITHOUT ALLOWING HOUR FOR APPEARANCE.**—Where the docket of a justice of the peace shows that he rendered judgment against a defendant for want of an answer, without giving him an hour after the time specified in the summons, in which to make his appearance, such judgment will be reversed on a writ of review. *Gaunt v. Perkins*, 354.

LACHES.

WHAT DELAY AMOUNTS TO.—A delay of over thirteen years, with sufficient knowledge to put one on inquiry in prosecuting a right where due diligence is required, is unreasonable, and amounts to laches. *Weiss v. Bethel*, 522.

LANDLORD AND TENANT.

1. **TENANCY IN CROP.**—Where a landlord leases land, and reserves a part of the crop as rent, the tenant can not sell or dispose of the part so reserved. The landlord and tenant are tenants in relation to such crop. *Cooper v. McGrew*, 327.
2. **PAROL LEASE FOR MORE THAN ONE YEAR.**—Where A. leases of W. a store under a verbal lease for three years, and enters into possession and pays rent, such tenancy becomes a tenancy from year to year, and can only be determined by notice from one party to the other. *Williams v. Ackerman*, 405.

LARCENY.

OF DIFFERENT ARTICLES AT ONE TIME from same person, can not be carved into distinct offenses, and but one indictment can be sustained. See *State v. McCormack*, 236.

CONVERSION OF MONEY RECEIVED FOR TAXES by sheriff, is. See *State v. Dale*, 229.

OF MONEY PAID BY MISTAKE, what constitutes. See *State v. Ducker*, 394.

LEASE.

PAROL AGREEMENT FOR, may be disregarded, when. See *Pulse v. Hamer*, 251.

See **LANDLORD AND TENANT**.

LEGACIES.

VESTED, what is. See *Warren v. Hembree*, 118.

LOST INSTRUMENTS.

GENUINENESS OF COPY OF, to be determined by jury, when. See *Rosendorff v. Hirschberg*, 240.

MARRIAGE AND DIVORCE.

1. MARRIAGE CONTRACT—FRAUDULENT CONCEALMENTS AT TIME OF.—Where a woman before marriage conceals from her intended husband the fact that she had some time before been the mother of an illegitimate child, such concealment is not such a fraud as will annul the marriage. *Smith v. Smith*, 100.
2. GROUNDS FOR DIVORCE—FALSE ACCUSATION OF UNCHASTITY.—If a husband or wife either falsely accuse the other of unchastity, such accusation is a sufficient cause for a divorce. *Id.*
3. CONDONED CRUELTY, HOW REVIVED AS CAUSE OF DIVORCE.—While acts of cruelty will be presumed to be condoned by the continued cohabitation of the parties, they will be revived by the subsequent commission of acts of the same nature. *Atteberry v. Atteberry*, 224.
4. IDEM.—Any conduct which, after reconciliation of the parties in a case of cruelty, creates reasonable apprehension of personal violence, will revive the condoned cruelty. *Id.*
5. CUSTODY OF MINOR CHILD, UNDER DECREE OF DIVORCE.—In a suit to dissolve the marriage contract by a husband against his wife, where the court granted a divorce on account of the adultery of the wife, and also decreed that the custody of an only child of the parties, a boy between three and four years of age, should be given to its maternal grandfather, with whom the divorced wife resided: *Held*, that this was erroneous, and that the father of the child, having the means to provide for its maintenance and support, and being otherwise a proper person to care for it, and being the party not in fault in the divorce suit, was entitled to the care and custody of the child in preference to its grandfather. *Jackson v. Jackson*, 402.
6. WHERE A DECREE OF DIVORCE IS SILENT AS TO THE DISPOSITION OF PROPERTY, the right thereto, given by section 495 of the civil code, may, in any case requiring the interposition of a court of equity, be enforced in an original suit in the circuit court for the county where the real estate is situated, without disturbing the original decree of divorce. *Weiss v. Bethel*, 522.

BREACH OF PROMISE OF MARRIAGE, complaint in action for, what sufficient, and request to marry unnecessary, when. See *Lahey v. Knott*, 198.

RECITALS IN DECREE OF DIVORCE OF SERVICE by publication, jurisdiction not presumed from, when. See *Northcut v. Lemery*, 316.

MARRIED WOMEN.

1. SEPARATE EARNINGS.—Under the law, as it now stands in this state, the wife is entitled to own and hold any property acquired with the proceeds of her own personal labor, and the husband has no right to compel her to turn it over to him. *Atteberry v. Atteberry*, 224.
2. RESIDING OUT OF STATE MAY EXECUTE POWERS TO CONVEY.—Where a married woman owns land in this state in her own right, and she and her husband reside out of the state, she may, by joining in a power of attorney with her husband, empower another to convey such property. *Moreland v. Brady*, 303.

MEASURE OF DAMAGES.

See WARRANTY.

MILEAGE.

NOT ALLOWED TO SHERIFF FOR CONVEYING CONVICTS to penitentiary in addition to other fees. See *Crossen v. Earhart*, 370.

MILITIA.

COUNTY COURT OBLIGED TO PROVIDE ARMORIES for organized volunteer companies, and refusal is subject to review. See *Mountain v. Multnomah Co.*, 470.

MISTAKE.

IN DEED, grantor must be party to, and proof must be clear and convincing. See *Remillard v. Prescott*, 37.

ITEM.—Must be mutual and clearly proved. See *McCoy v. Bayley*, 196.

MORTGAGES.

1. OF CHATTELS, FORECLOSURE WHERE MORTGAGE PROVIDES MANNER OF.—Where, in a mortgage of chattels, there is a manner provided for foreclosing the same, either party may insist that the foreclosure shall be in the manner provided; but such party must comply with the mortgage stipulation on his part. If the mortgagor insists that the foreclosure be in the manner stipulated, he must, if delivery of possession to the mortgagee is necessary to such foreclosure, deliver the mortgaged property to the mortgagee to enable him to sell the same. *Jacobs v. McCalley*, 124.
2. IDEM.—A MORTGAGOR MAY SELL or assign mortgaged personal property, subject to the lien of the mortgage. *Id.*
3. TO SECURE FUTURE ADVANCES, VALID.—A note and mortgage given for a greater sum than is due by the mortgagor, to secure both a present indebtedness and future advances, is valid to secure the amount due at its date as well as future advances actually made in pursuance of a parol agreement entered into when it was given, although the mortgage does not set forth the real character of the transaction. *Hendrix v. Gore*, 406.
4. PAYMENTS ON, NEED NOT BE PLEADED ON FORECLOSURE.—A payment of money made on account of a mortgage, is not a cause of suit, which must be pleaded by the defendant as a counter-claim to entitle him to prove such payment in a suit to foreclose the mortgage. *Id.*

ARE TAXABLE. See *Poppleton v. Yamhill Co.*, 337.

PLEA OF PAYMENT on foreclosure, what sufficient. See *Hendrix v. Gore*, 406.

MOTIONS.

TO PERFECT APPEAL, when must be filed. See *State v. McKinmore*, 207.

MUNICIPAL CORPORATIONS.

1. SEWER IMPROVEMENTS — PROCEEDINGS RELATING TO STREETS DO NOT APPLY.—The common council of the city of Portland, under section 106 of the charter, has power to lay down necessary sewers, and charge their cost to the property directly benefited; and it is not necessary, before

proceeding to construct such sewer, that the council shall declare by ordinance that the sewer is necessary, or create a taxing district to be charged with the cost of its construction. *Strowbridge v. City of Portland*, 66.

2. **BOARD OF TRUSTEES—JURISDICTION IN ELECTION CONTEST NOT EXCLUSIVE.**—The provision in a city charter that the board of trustees "shall judge of the qualifications and election of their own members," does not oust the jurisdiction of the circuit court over usurpations of such office. It will still entertain an action under section 354 of the civil code against a person unlawfully exercising the office of trustee of such city, and the provision in the city charter will be held as affording merely a preliminary or cumulative tribunal. *State v. McKinnon*, 493.
- MAY DISREGARD CONTRACT VIOLATED BY EMPLOYING CHINESE** on public works. See *City of Portland v. Baker*, 356.
- GRADING STREETS**, authority of city of Portland to control. See *Price v. Knott*, 438.

MURDER.

ABSENCE OF DEFENDANT AT VIEW OF PREMISES not error, when. See *State v. Ah Lee*, 214.

DELIBERATION AND PREMEDITATION, what sufficient evidence of. Id.

NEGLIGENCE.

1. **SLIGHT CONTRIBUTORY NEGLIGENCE** will not prevent a recovery, if the negligence complained of has been gross. *Holstine v. O. & C. R. R. Co.*, 163.
2. **EVIDENCE OF PRIOR ACCIDENT IN ACTION FOR.**—In an action against a railroad company to recover damages for an injury sustained by one of its passengers in consequence of alleged negligence on the part of the company, evidence of another accident having occurred at the same place, under similar circumstances, is inadmissible. *Davis v. O. & C. R. R. Co.*, 172.
3. **CONTRIBUTORY—DRUNKENNESS—PROXIMATE CAUSE.**—Drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the death of the deceased. If the person injured got drunk under such circumstances that any reasonably prudent man could foresee that he was putting himself in such a condition that that which resulted might probably happen, then his drunkenness would be a defense. Id.
4. **IDEM—PASSENGERS, PRESUMPTIONS BY.**—A passenger has no right to presume that a ferry-boat has landed on account of the chain-guard and barriers across the bow of the boat being down, when warned and personally notified at the time by those in charge that a landing had not been made. Id.

CONTRIBUTORY, passenger landing at intermediate point, not guilty of so as to forfeit rights. See *Dice v. W. T. & L. Co.*, 60.

ACTION FOR VALUE OF HORSES KILLED BY RAILROAD, evidence in as to purchase price, what immaterial. See *Holstine v. Oregon & California R. R. Co.*, 163.

NEGOTIABLE INSTRUMENTS.

See **PROMISSORY NOTES**.

NEW TRIAL.

DISCRETION OF COURT AS TO.—A motion for a new trial, based upon matters *dehors* the record, is addressed to the sound discretion of the court, and will not be reviewed on appeal. *State v. McDonald*, 113.

ON GROUND THAT EVIDENCE DOES NOT JUSTIFY FINDING by the court, refusal of, rests in discretion and not reviewable on appeal. See *Hallock v. City of Portland*, 29.

JUSTICE OF THE PEACE HAS NO POWER to grant, when. See *Griffin v. Pittman*, 342.

NOTICE.

OF APPEAL, service of, must precede filing of undertaking. See *Weiss v. Jackson Co.*, 529.

ITEM.—Errors not assigned in not considered. See *State v. McKinnon*, 487.

ITEM.—When not sufficiently specific. Id.

CREDITORS UNDER COMPOSITION AGREEMENT PRESUMED TO HAVE NOTICE of condition of property assigned, when. See *Nicolai v. Lyon*, 60.

OF WATER RIGHTS ON LAND, PURCHASER presumed to have. See *Cofman v. Robbins*, 278.

TO DETERMINE PAROL LEASE FOR MORE THAN A YEAR, when necessary. See *Williams v. Ackerman*, 405.

NUISANCE.

PUBLIC, COMPLAINT IN ACTION FOR DAMAGES from, must show what. See *City of Roseburg v. Abraham*, 509.

OAKLAND, CITY OF.

CONTESTED ELECTIONS IN, JURISDICTION OF BOARD OF TRUSTEES over, not exclusive. See *State v. McKinnon*, 493.

PARENT AND CHILD.

FATHER ENTITLED TO CUSTODY OF CHILD on decree for divorce, when. See *Jackson v. Jackson*, 402.

PARTIES.

WHO MAY BE JOINED in suit to enforce right to land. See *Weiss v. Bethel*, 522.

PARTNERSHIP.

1. DISSOLUTION, WHEN BUSINESS NOT PRACTICABLE.—Where, during the continuance of a copartnership, it becomes impracticable to carry on its business without great loss, a court of equity will decree a dissolution of such copartnership, in a suit brought for that purpose by any one of the partners. *Holladay v. Elliott*, 84.

2. PARTNERSHIP BUSINESS, PROFITS OF, HOW DETERMINED.—A referee appointed to ascertain and state an account between partners should ascertain what the real and actual profits were, and not what they ought or might have been. *Boire v. McGinn*, 466.

3. IDEM—EXPERT TESTIMONY NOT ADMISSIBLE.—Where the books of a partnership fail to show the true state of its business, resort may be had to a calculation of the profits from the amount of merchandise proven to have

been sold by said firm at the rate per cent. profit proven to have been made on said merchandise in that particular business, but not to expert testimony of witnesses engaged in a similar business, to prove that profit was made by this firm in their business, for the purpose of charging one of the partners therewith. *Id.*

4. **ITEM—ENTRIES IN PARTNERSHIP BOOKS, EFFECT OF.**—In stating the accounts of partners, as between themselves, the rule is that the entries on the partnership books, to which both partners have had access at the time when those entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries; subject, however, to the right of either party to show a mistake or error in the charge or credit. *Id.*

PASSENGERS.

LEAVING STEAMBOAT AT INTERMEDIATE POINT do not forfeit rights. See *Dice v. W. T. & L. Co.*, 60.

ON RAILROAD, evidence of prior accident inadmissible in action for injury to, when. See *Davis v. Oregon & California R. R. Co.*, 172.

ON FERRY-BOAT have no right to presume the boat has landed, when. *Id.*

PAUPER.

NO IMPLIED PROMISE TO PAY FOR SERVICES OF, but express hiring must be proved. See *Bennett v. Stephens*, 444.

PEDIGREE.

DECLARATIONS OF DECEASED PERSONS respecting, when admissible. See *Thompson v. Woolf*, 454.

PLEADING AND PRACTICE.

1. **PLEADING—ALLEGATION OF OWNERSHIP IN ACTION FOR CONVERSION.**—In an action for the wrongful conversion of personal property when the complaint contains no allegation that it was either the property of plaintiff or property in which he was interested, nor any allegation that it was wrongfully taken from his possession, it is not sufficient to sustain a judgment after verdict. *Johnson v. Oregon Steam Navigation Co.*, 35.
2. **INSTRUCTION—MATTERS NOT PERTINENT.**—The mere omission to instruct upon matters pertinent to the case is not error, without the attention of the court is called to the matter. *Page v. Finley*, 45.
3. **AN ALLEGATION OF FRAUD**, to be sufficient, must state facts which show that the party complaining was misled and injured by the matter complained of. *Nicolai v. Lyon*, 56.
4. **DENIAL ON INFORMATION AND BELIEF.**—Where the plaintiff in his reply used these words: "But whether the defendant was at the time a non-resident of this state, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies the said allegation;" *Held*, that this was a sufficient denial of the allegation of non-residence. *Sherman v. Osborn*, 66.
5. **AFFIDAVITS NOT ADMITTED TO EXPLAIN PLEADINGS.**—In order to determine the issues to be tried in an action, the court can only look to the pleadings, which can not be enlarged or explained by affidavits. *Cawthorn v. King*, 138.

6. **INSTRUCTIONS MUST APPEAR TO HAVE BEEN PERTINENT.**—The refusal of the circuit court to allow certain questions propounded to a witness to be answered will not be held error, unless it can be ascertained from the bill of exceptions, and other portions of the record, that they were pertinent and relevant. *Lahey v. Knott*, 198.
7. **INSTRUCTIONS MUST BE PERTINENT.**—The court may refuse to give instructions asked for when they are not pertinent. *Rosendorf v. Hirschberg*, 240.
8. **STATUTE OF LIMITATIONS OF ANOTHER STATE, HOW PLEADED.**—An answer which alleges that the note on which the action is based was executed in the State of California, and that the maker thereof was a resident of said state at the time of its execution, and has been ever since, is insufficient. Under section 26 of the code, in pleading the statute of limitation in force in another state, in bar of the action, it must be averred that the cause of action arose in that state, and was between non-residents of this state. *Crawford v. Roberts*, 324.
9. **COMPLAINT IN ACTION ON UNDERTAKING IN REPLEVIN.**—In an action brought upon an undertaking in replevin, facts were alleged showing the commencement of the action, the undertaking for the immediate delivery of the property in controversy, its delivery, and the failure to prosecute the action of replevin, or redeliver the property. The complaint then alleges, that by reason of the premises aforesaid, said undertaking has become forfeited to this plaintiff, and an action has accrued to this plaintiff against the said defendants, jointly and severally, and he hath right to demand and have from the said defendants, the said sum of one thousand two hundred dollars: *Held*, that the facts so stated are sufficient to constitute a cause of action. *Cooper v. McGrew*, 327.
10. **WRIT OF REVIEW, QUESTIONS OF FACT NOT TRIED ON.**—In trying questions raised in cases of review, this court will not try questions of fact which were passed on by the inferior court, unless such findings are manifestly wrong. *Poppleton v. Yamhill Co.*, 337.
11. **SUFFICIENCY OF PLEA OF PAYMENT ON FORECLOSURE OF MORTGAGE.**—Where a defendant, in his answer, in a suit to foreclose a mortgage, alleged that he had fully paid it, he was entitled to prove on the trial that the plaintiff received money at different times, to be applied as payment on the mortgage, although he had not pleaded such payments as a counter-claim. *Hendrix v. Gore*, 406.
12. **ACTION FOR WAGES—DEFENSE, WHEN MUST BE PLEADED.**—Evidence tending to show that respondent was poor and in indigent circumstances at the time when she entered into the service of the appellant was not admissible, for the reason that the answer contained no such averment as a ground of defense. *Bennett v. Stephens*, 444.
13. **DISCRETION OF THE COURT TO ADMIT EVIDENCE, IN WHAT CASE.**—As a general rule, it is a matter resting in the discretion of the judge to receive, at any convenient stage of the trial, any evidence which counsel undertakes to produce and shows will be rendered material by other evidence, and if not subsequently connected with the issue, to be laid out of the case; and the exercise of such discretion is not reviewable. *Id.*
14. **AMENDMENTS ON APPEAL.**—The plaintiff, in an action brought in a justice's court, made an oral reply to a counter-claim set up by the defend-

ant in his answer, but such oral reply was not entered by the justice in his docket. The justice proceeded to try the case, and after hearing the testimony of the parties, disallowed the greater portion of the counter-claim, whereupon the defendant appealed to the circuit court: *Held*, that it was not error in the circuit court to allow a reply to be filed in that court, so as to present for trial the same issue which was, in fact, tried in the justice's court. *Rohr v. Isaacs*, 451.

15. **SPECIAL FINDINGS—QUESTIONS WITHDRAWN BEFORE VERDICT.**—The submission of particular questions of fact to be answered by the jury in addition to their general verdict, is a matter of discretion with the court, and the submission may be withdrawn by the court at any time before the jury have found a special verdict on the particular questions submitted to them. *Id.*
16. **PUBLIC NUISANCE—SPECIAL DAMAGE MUST BE ALLEGED.**—The complaint in an action for damages occasioned by a public nuisance, must allege facts showing that the complainant has suffered some special or extraordinary damage, beyond what has been occasioned to the public generally, or it will be held insufficient on demurrer. *City of Roseburg v. Abraham*, 509.
17. **COMPLAINT DOES NOT STATE FACTS CONSTITUTING CAUSE OF SUIT, WHEN.** A complaint in a suit brought to establish plaintiff's right to an undivided one third part of certain real property, does not state facts sufficient to constitute a cause of suit against a defendant which merely alleges complainant's right to such undivided one third, and "that defendant is in possession of the whole of said property, and claims some interest in the same as owner thereof." *Weiss v. Bethel*, 522.
18. **SUIT BROUGHT IN WRONG COUNTY—OBJECTION, HOW AVOIDED.**—Where suit is brought to determine an adverse claim to real property, in the wrong county, a subsequent change, by order of the court, before answer, to the proper county, cures the defect and avoids the objection. *Id.*
19. **THE PLAINTIFF MAY JOIN IN HER SUIT,** to enforce her right to land, and obtain the legal title from one party, any other parties who may be in possession claiming adversely to her right. *Id.*
20. **COMPLAINT—FRAUDULENT CONDUCT NOT AFFECTING RIGHTS.**—The complaint is insufficient as to a defendant who is merely charged with fraudulent conduct which does not affect the right of complainant in controversy. *Id.*

ACTION FOR BREACH OF PROMISE OF MARRIAGE, complaint in, when sufficient, and proof of request to marry unnecessary, when. See *Lahey v. Knott*, 198.

AFFIDAVIT IN PROCEEDING FOR CONTEMPT not a pleading, but merely evidence which may be rebutted. See *State v. McKinnon*, 487.

IN EJECTMENT, defendant's failure to plead title, effect of. See *Phillippi v. Thompson*, 428.

PAYMENTS ON MORTGAGE NEED NOT BE PLEADED in foreclosure suit. See *Hendrix v. Gore*, 406.

COUNSEL ASSUMING FACTS NOT PROVED, is error sufficient to reverse judgment, when. See *Tenny v. Mulvaney*, 513.

ESTOPPEL MUST BE PLEADED if there is opportunity. See *Remillard v. Prescott*, 37.

PROOF OF LOST INSTRUMENT BY COPY, right of jury to decide concerning
See *Rosendorf v. Hirschberg*, 240.

OMISSION OF JUSTICE TO SWEAR JURY, objection to, after judgment too late
when. See *Griffin v. Pitman*, 342.

DEFAULT ENTERED BY JUSTICE WITHOUT ALLOWING AN HOUR for appear-
ance, judgment in case of reversed on writ of review. See *Gauvin v. Per-
kins*, 354.

COMPLAINT FOR INJUNCTION must show that plaintiff will suffer irreparable
injury if defendant not enjoined. See *City of Portland v. Baker*, 356.

COMPLAINT FOR INJUNCTION AGAINST GRADING STREET, when sufficient.
See *Price v. Knott*, 438.

INTERPLEADER, BILL OF, when proper, and evidence to prove collusion in,
when inadmissible. See *Fahie v. Lindsay*, 474.

See **FINDINGS, REVERSES**.

As to practice on appeal, see **APPEAL**.

PORTLAND, CITY OF.

AUTHORITY OF, TO CONTROL GRADING STREETS determined. See *Price v.
Knott*, 438.

CONSTRUCTION OF SEWERS IN, power of common council with respect to, and
how exercised. See *Strowbridge v. City of Portland*, 66.

POSSESSION.

UNDER COLOR OF TITLE presumed to be according to title. See *Phillippi v.
Thompson*, 428.

UNDER PAROL AGREEMENT FOR LEASE gives no rights, when. See *Pulse v.
Hamer*, 251.

POWER OF ATTORNEY.

WIFE RESIDING OUT OF STATE MAY JOIN WITH HER HUSBAND IN, to autho-
rize conveyance of her land. See *Moreland v. Brady*, 303.

PROMISSORY NOTES.

1. RELEASE OF ONE JOINT MAKER.—A release of one joint maker of a joint
and several promissory note, by the holder thereof, operates as a dis-
charge of all the joint parties to said note. *Crawford v. Roberts*, 324.

2. WAIVER OF DEMAND OF PAYMENT, WHAT NOT.—F., who was an accom-
modation indorser, indorsed on the back of a note before due, these
words: "I hereby waive notice of protest for non-payment." Held, not
to be a waiver of *demand of payment* from the maker when due. Agree-
ments of this character are to be construed strictly, and not extended
beyond the fair import of the terms. *Sprague v. Fletcher*, 367.

ARE TAXABLE. See *Poppleton v. Yamhill Co.*, 337.

QUIETING TITLE.

IN WILD LAND, suit for, when maintainable. See *Thompson v. Woolf*, 454.

RAILROADS.

HORSES KILLED BY, in action for, evidence as to purchase price immaterial,
when. See *Holstine v. Oregon & California R. R. Co.*, 163.

EVIDENCE OF PRIOR ACCIDENT inadmissible in action for injury to passenger on, when. See *Davis v. Oregon & California R. R. Co.*, 172.

REAL ESTATE.

1. **PAROL AGREEMENT, POSSESSION OF LAND UNDER.**—Where one man agrees by parol with another to lease land for a term of years, to begin in the future, and agrees to put such parol contract in writing, and no consideration passes between the parties, either party may disregard the parol contract, and if the lessee go on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus obtained will not give him any rights under such parol agreement. *Pulse v. Hamer*, 251.
2. **REMEDY FOR RENTS AND PROFITS RECEIVED TO THE USE OF ANOTHER.**—Where one holds the possession of land as the trustee of another, and while so holding the possession receives to his own use the rents and profits which belong to his *cestui que trust*, the *cestui que trust* must resort to a suit in equity to recover such rents and profits of the trustee. *Hill v. Cooper*, 254.
3. **ITEM—RENTS AND PROFITS AND POSSESSION RECOVERED IN SAME ACTION.**—Where a *cestui que trust* prosecutes a suit in equity to compel his trustee to convey the legal title to him, he may in said suit recover of the trustee the rents and profits which the trustee has received to the use of the *cestui que trust* while the trustee was in possession of the land. *Id.* **POSSESSION UNDER COLOR OF TITLE** presumed to be according to title. See *Phillippi v. Thompson*, 428.

OF MARRIED WOMAN residing out of state, she may join with her husband in giving power of attorney to convey. See *Moreland v. Brady*, 303.

See **DONATION ACT; DEEDS; FRAUDULENT CONVEYANCES; DOWER; EJECTMENT; SCHOOL LANDS.**

RECITALS.

IN DEED, ESTOPPEL BY. See *Bayley v. McCoy*, 259.

IN DECREES AS TO SERVICE OF SUMMONS by publication afford no presumption of jurisdiction, when. See *Northcut v. Lemery*, 316.

REFEREES.

FINDINGS OF FACT BY—WHAT EFFECT GIVEN THEM.—In a suit in equity, where the court appoints a referee to take the testimony and report the facts and the law to the court, this court will not reverse the findings of facts by the referee unless the same are clearly against the weight of the testimony. *Fahie v. Lindsay*, 474.

IN SUITS BETWEEN PARTNERS, duty of, as to ascertaining profits. See *Boire v. McGinn*, 466.

RENTS AND PROFITS.

OF DECEDENT'S REALTY, widow not entitled to one third immediately after the death. See *Leonard v. Grant*, 276.

See **REAL ESTATE.**

REPLEVIN.

COMPLAINT ON UNDERTAKING in, when sufficient. See *Cooper v. McGrew*, 327.

RES JUDICATA.

1. JUDGMENT, WHEN AND HOW FAR CONCLUSIVE AS.—The judgment of a court of competent jurisdiction is not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not. *Barrett v. Failing*, 152.
2. IDEM—PAROL EVIDENCE NOT ADMISSIBLE TO SHOW THAT QUESTION WAS WITHDRAWN.—In a suit or proceeding to recover property or its value when the plea of a former adjudication is interposed by the defendant, the plaintiff will not be permitted to offer parol evidence to show that an issue made by the pleadings in the former suit was withdrawn from the consideration of a referee before whom it was tried. *Id.*
3. EJECTMENT—JUDGMENT CONCLUSIVE.—A judgment in ejectment is conclusive as to the legal title and right of possession as between the parties, and can not be collaterally impeached. *Hill v. Cooper*, 254.

ORDERS OF COUNTY COURT IN DISTRIBUTION of estates are final, when. See *Winkle v. Winkle*, 193.

ORDER CONFIRMING SHERIFF'S SALE, conclusive as to regularity of proceedings. See *McRae v. Daviner*, 63.

REVIEW, WRIT OF.

LIES TO BOARD OF EQUALIZATION to review order correcting assessment. See *Poppleton v. Yamhill Co.*, 337.

DECISIONS OF BOARD OF SCHOOL LAND COMMISSIONERS not reviewable by the courts. See *Corpe v. Brooks*, 222.

DOES NOT LIE TO REVIEW ALLOWANCE OF CORONER'S FEES for summoning jury by county court. See *Cook v. Multnomah Co.*, 170.

LIES TO CORRECT ERRORS IN TRANSACTION OF COUNTY BUSINESS by county court. See *Mountain v. Multnomah Co.*, 470.

QUESTIONS OF FACT not tried on, except in what cases. See *Poppleton v. Yamhill Co.*, 337.

JUSTICE'S JUDGMENT BY DEFAULT REVERSED ON, where an hour not allowed for appearance. See *Gaunt v. Perkins*, 354.

RIPARIAN OWNER.

PURCHASER OF TIDE LAND FROM, right of, to deed from the state. See *Parker v. Rogers*, 183.

ROADS AND HIGHWAYS.

1. APPROPRIATION OF PUBLIC ROAD BY CORPORATION, AGREEMENT BY COUNTY COURT FOR.—A corporation, having been organized to construct a road, located a portion of its road upon a public road, but made no application to the county court to agree upon the extent, terms, and conditions upon which such public road might be used, as provided in section 26 of the corporation law. Afterwards another corporation was organized to construct a road, and made an agreement with the county court as to the extent, terms, and conditions upon which the public road might be ap-

propriated by the corporation as a part of its road. *Held*, that such agreement was valid, and that the corporation first organized had not the exclusive right to contract with the county court for the use and appropriation of the public road, although it first surveyed and located the line of its road on the public highway. *Per Mr. Justice Boise*, dissenting: A road corporation may, when it is necessary and convenient, locate its road on the county road, whether the county court assent to it or not, and having done so, the right becomes property of which the corporation can not be deprived by the county court. The assent of the county court is only necessary to the right to collect tolls upon the road appropriated. *Douglas Co. Road Co. v. Canyonville etc. Road Co.*, 102.

2. **REMEDIY OF OWNER OF LAND FROM WHICH MATERIALS TAKEN TO REPAIR.**—If the owner of lands from which stone or other materials are taken to repair the public roads feels aggrieved by the acts of the supervisor, he must apply for redress to the county court, while transacting county business, to assess and determine the damages sustained by him. *Kendall v. Post*, 141.
3. **DAMAGES FOR MATERIALS TAKEN TO REPAIR, ASSESSMENT OF.**—Section 29 of chapter 50 of the miscellaneous laws, which provides for the assessment of damages for taking stone or other materials to repair the public roads, is not unconstitutional because it authorizes the county court to assess the damages without a trial by jury. *Id.*
4. **CORPORATION MAY USE PART OF FOR TOLL ROAD.**—A corporation organized under the general incorporation law of this state to construct a plank or clay road, is authorized by law to appropriate and use any part of a public road which may be necessary and convenient in the location of such plank or clay road; but the corporation does not thereby acquire the right to exclude another corporation subsequently formed for the same purpose, from appropriating and using the same part of the public road when it is necessary and convenient in the location of its road. *Canyonville etc. Road Co. v. Stephenson*, 263.

ROAD SUPERVISORS.

1. **SOLE JUDGE OF NECESSITY FOR TAKING MATERIALS.**—In repairing a public road, the supervisor of roads has authority to enter upon any lands adjoining or near the public road, whether the same be inclosed or not, in order to obtain stone with which to repair the road; and the supervisor alone is to be the judge whether it is necessary to use stone or not in order to make the repairs. *Kendall v. Post*, 141.
2. **IDEM—COURT OF EQUITY WILL NOT INTERFERE.**—So long as the supervisor does no act to willfully oppress or annoy the owner of the premises where the stone or other materials are procured to repair the public roads, a court of equity will not interfere to restrain him in the discharge of his official duties as supervisor. *Id.*

SALES.

1. **WHAT DOES NOT CONSTITUTE—MONTHLY PAYMENTS.**—Where the owner of an article of personal property, under an agreement in writing, delivered the same to another person to be used by him at the stipulated price

or hire of ten dollars per month, to be paid monthly until the sum of sixty-five dollars should be paid, when the title to the same was to become vested in the person paying the money, the agreement did not constitute a sale. Under such agreement the title did not pass to the party receiving the property, and a sale of it by him to a *bona fide* purchaser conveyed no title. *Singer Mfg. Co. v. Graham*, 17.

2. **TITLE IN VENDOR AFTER DELIVERY.**—When a chattel is delivered to one who has bargained for the purchase thereof, and agreed to pay therefor at a future day under an express contract that no title is to vest in him until payment, the property of the vendor is not divested, and the purchaser takes, at most, only a right by implication to the use of the chattel until default in the stipulated payment. *Rosendorf v. Hirsclberg*, 240.

BREACH OF WARRANTY ON SALE OF ENGINE, measure of damages in case of. See *Drake v. Sears*, 209.

SCHOOL LANDS.

RIGHT OF PURCHASER OF TO CUT TIMBER BEFORE PAYMENT.—The purchaser of a tract of school land, having paid one third part of the purchase-money, and received a certificate of purchase under section 10, p. 632, of the code, afterwards cut and piled up a quantity of cord-wood on the land, and then assigned his certificate of purchase; the assignee did not thereby become entitled to the wood by virtue of the assignment of the certificate. The wood so cut became personal property when severed from the realty, and belonged to the purchaser of the land who cut and piled it up; and it did not remain the property of the state until the land was fully paid for. *Schmidt v. Vogt*, 344.

SCHOOL LAND COMMISSIONERS.

See **BOARD OF SCHOOL LAND COMMISSIONERS**.

SERVICES.

AGREEMENT TO PAY FOR, THOUGH BEGUN GRATUITOUSLY, what constitutes. See *Bennett v. Stephens*, 444.

OF PAUPER OR RELATIVE, no implied promise to pay for. *Id.*

SEWERS.

CONSTRUCTION OF, IN THE CITY OF PORTLAND, power of the common council respecting, and how exercised. See *Strowbridge v. City of Portland*, 66.

SHERIFFS.

1. **LIABILITY OF, FOR CONVERSION OF MONEY COLLECTED FOR TAXES.**—In a prosecution of a sheriff for converting money collected by him as taxes, it is competent to show that he received sums of money from different individual taxpayers. *State v. Dale*, 229.

2. **MILEAGE OF, IN CONVEYING PRISONERS TO PENITENTIARY.**—A sheriff is not entitled to mileage in addition to other fees prescribed in section 5 of the laws of 1874, prescribing the fees of sheriffs for transporting a convict to the state penitentiary. Said section 5 prescribes all the compensation a sheriff is entitled to for such service. *Crossen v. Earhart*, 370.

As to sales by, on execution, see **EXECUTIONS**.

SHERIFF'S JURY.

1. **EFFECT OF VERDICT OF.**—The verdict of the jury, rendered in writing and signed by the foreman, under section 284, of the Civil Code, operates as a full indemnity to the sheriff proceeding in accordance therewith. *Remdall v. Swackhamer*, 502.
2. **IDEM.**—Where the verdict is against the claimant, he can not afterwards maintain an action against the sheriff for the recovery of the possession of the property, or for damages for taking it, so long as the sheriff proceeds in accordance with the execution under which the property was seized. *Id.*

STATUTES.

1. **OF ANOTHER STATE, CONSTRUCTION OF.**—When the statute of another state is adopted in this state, we must look principally to the decisions of that state to ascertain its proper judicial construction. *Gerrish v. Gerrish*, 351.
2. **ACT OF THE LEGISLATURE CONSTRUED—FERRY FRANCHISE.**—The act of the legislature of the late territory, passed January 15, 1852, granting a ferry right to James B. Stephens across the Willamette river, at Portland, granted but one ferry, with fixed landings on each side of the river. The exclusive right to said Stephens to do all the ferrying across said river, within certain limits, for ten years, expired at the end of said ten years. *Price v. Knott*, 438.
3. **IDEM.**—One ferry consists of one line of boats on one line of travel. The owners of this franchise, having a line of boats running as a ferry from Stark street to a point opposite in East Portland, the right to run this ferry does not grant them a right to run another line of boats from Oak street to a point opposite in East Portland. *Id.*

ASSIGNMENT ACT OF 1878 construed. See *Tichenor v. Coggins*, 270.

CONSTITUTIONALITY OF CERTAIN WAGON ROAD ACTS determined on the ground that they are public and not special laws. See *Allen v. Hirsch*, 412.

PROHIBITING EMPLOYMENT OF CHINESE ON PUBLIC WORKS, construction and effect of. See *City of Portland v. Baker*, 356.

ACT REGULATING FOREIGN CORPORATIONS construed to relate only to those specified in the title. See *Singer Mfg. Co. v. Graham*, 17.

CHARTER OF CITY OF PORTLAND construed with respect to power to construct sewers. See *Strowbridge v. City of Portland*, 66.

CHARTER OF CITY OF OAKLAND CONSTRUED respecting power of board of trustees to decide contested elections. See *State v. McKinnon*, 493.

See DONATION ACT.

STATUTE OF FRAUDS.

PAROL LEASE FOR MORE THAN A YEAR creates tenancy from year to year, when. See *Williams v. Ackerman*, 405.

STATUTE OF LIMITATIONS.

OF ANOTHER STATE, how pleaded. See *Crawford v. Roberts*, 324.

STEAMBOATS.

PASSENGER LANDING AT INTERMEDIATE POINT does not forfeit rights. See *Dice v. W. T. & L. Co.*, 60.

STOCKHOLDERS.

See CORPORATIONS.

STREETS.

WHAT GRADE CITY MAY ESTABLISH.—The authorities of the city of Portland have control of the grading of the streets of the city, and may grade them down or elevate them when they approach the river, as the exigencies of travel or commerce shall require. *Price v. Knott*, 438.

INJUNCTION AGAINST GRADING OF, may be awarded, when. See *Price v. Knott*, 438.

SUMMONS.

SERVICE OF, BY PUBLICATION, RECITALS IN DECREE as to, do not afford presumption of jurisdiction, when. See *Northcut v. Lemery*, 316.

SURETYSHIP.

1. JUDGMENT AGAINST PRINCIPAL DOES NOT DISCHARGE SURETY.—The recovery of a judgment against a principal debtor, on a note given by him, is no bar to an action against him and another on a note given as collateral security for the debt of the principal, unless such judgment has been satisfied. *McCullough v. Hellman*, 191.

2. FAILURE TO PROCEED AGAINST PRINCIPAL.—When the debt becomes due, the request of the surety to sue the principal debtor, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety will not thereby be discharged. *Findley v. Hill*, 247.

3. VOID AGREEMENT EXTENDING TIME OF PAYMENT to principal, does not release surety. *Id.*

SURETIES ON APPEAL, affidavits of, when filed. See *State v. McKinmore*, 207.

TAXES.

LIABILITY OF SHERIFF FOR CONVERTING money collected for, and evidence of. See *State v. Dale*, 229.

See ASSESSMENT AND TAXATION.

TIDE LANDS.

PURCHASER OF, FROM RIPARIAN OWNER.—A person who has purchased tide land of a riparian proprietor, has the exclusive right to a deed from the state to such tide land, if he makes his application to purchase in the time allowed by the statute. *Parker v. Rogers*, 183.

TIMBER.

ON SCHOOL LAND, PURCHASER'S RIGHT to cut, before payment. See *Schmidt v. Vogt*, 344.

TRADE MARK.

INFRINGEMENT OF.—L. recorded the following as a trade mark: "I X L General Merchandise Auction Store," and used the same as a sign over his place of business. M. afterwards used as a sign over his store: "Great I X L Auction Co.:" *Held*, that the court will not suppress the use of the latter as an infringement of L.'s trade mark. *Lichtenstein v. Mellis*, 464.

TRIAL BY COURT.

FINDINGS ON, regarded as a verdict. See *Hallock v. City of Portland*, 29.

TRUSTEE.

CESTUI MAY RECOVER RENTS AND PROFITS from, in suit to compel conveyance. See *Hill v. Cooper*, 254.

UNDERTAKING.

ON APPEAL, amount of, and affidavits of sureties when filed. See *State v. McKinmore*, 207.

IDEM—DEFECTS IN, dismissal of appeal for, does not operate as affirmance. See *State v. McKinnon*, 485.

IDEM—NOTICE MUST PRECEDE filing of, and refile will not do. See *Weiss v. Jackson Co.*, 529.

IN REPLEVIN, COMPLAINT ON, when sufficient. See *Cooper v. McGrew*, 327.

UNDUE INFLUENCE.

TO SET ASIDE CONVEYANCE FOR, in equity, what must be proved. See *Biglow v. Leabo*, 147.

USAGE.

See CUSTOM.

VERDICT.

1. GENERAL, IN ACTION FOR SPECIFIC CHATTELS INSUFFICIENT, WHEN.—In an action to recover specific personal property, where the jury find a general verdict for damages, without finding on the issues of ownership and of the value of the property, such general verdict is not warranted by the statute, and no judgment can be rendered thereon. *Jones v. Snider*, 127.
2. WHAT PRESUMPTIONS NOT RAISED UPON.—Where the statute directs a special finding upon certain issues, a general verdict for the plaintiff will not raise a presumption that the jury have passed upon the issues not named in the verdict. *Id.*
3. GENERAL, AGAINST JOINT WRONG-DOERS.—Where, in an action for a wrongful conversion of property against two defendants, both answer, and a general verdict is rendered, it is a verdict against both defendants, and judgment should be given against both. But if, in such case, judgment is rendered against one only, it is error. If the defendant against whom the judgment is rendered appeals from the justice's court where the judgment was rendered, to the circuit court, and on the trial had in

the circuit court both defendants appear and defend, the circuit court has jurisdiction to render judgment against both defendants on a verdict of guilty against both. *Cauthorn v. King*, 138.

FINDINGS ON TRIAL BY COURT regarded as. See *Hallock v. City of Portland*, 29.

OF SHERIFF'S JURY, effect of. See *Remdall v. Swackhamer*, 502.

WAIVER.

OF DEMAND OF PAYMENT on note, what is not. See *Sprague v. Fletcher*, 367.

WARRANTY.

1. **MEASURE OF DAMAGES ON BREACH OF, ON SALE OF ENGINE.**—In case of a breach of warranty in the sale of an engine to be used in elevating grain at a warehouse, the warrantee is entitled to recover of the warrantor such damages as naturally, according to the usual course of things, would result from the breach, and the necessary expense incurred by the warrantee in putting up said engine would be such natural damages. So, also, the expense incurred by the warrantee in handling and storing grain while trying to work the engine which proved a failure. *Drake v. Sears*, 209.
2. **PROFITS OF BUSINESS LOST BY BREACH OF, NOT ALLOWED, WHEN.**—As a rule, the loss of the profits of a business which has been interrupted by a breach of warranty can not be claimed, unless the parties are shown to have contemplated, or can reasonably be presumed to have contemplated such loss at the time the contract was made. *Id.*

WATERCOURSES.

1. **DIVERSION OF, BY ONE NOT A RIPARIAN OWNER.**—H. is the owner of the land through which a small stream of water runs, used by him for propelling machinery. L., not being the owner of any land adjoining said stream, went above the land of H. and diverted a portion thereof from its natural channel, and conducted it over and across the lands of other persons to where it was used for irrigation and other purposes, by means of which portions thereof were wasted: *Held*, that such diversion was unlawful, and while the instructions of the court contain a correct statement of the law as to the respective rights of riparian owners, they were inapplicable to the facts developed in this case, as the diversion was made in this case by a party who was not a riparian owner. *Hayden v. Long*, 244.
2. **AGREEMENT FOR DIVISION OF STREAM BETWEEN RIPARIAN OWNERS—WATER RIGHTS—PAROL AGREEMENT.**—Where a stream of water which passes through the lands of different persons is divided by them by a parol agreement, and each party repairs ditches, and receives and cares for his share of such water, such agreement will be enforced in a court of equity. *Coffman v. Robbins*, 278.
3. **IDEM—NOTICE.**—Where one buys land, he is presumed to buy with notice of the water rights in use on the premises. *Id.*
4. **IDEM—LOWER OWNER ON STREAM.**—When a stream of water flows through the lands of different persons in a well-defined channel, the lower owner

on the stream has a right to have the water flow through his lands undiminished; except so far as the upper riparian owner may use the same for the use of his premises for domestic use, stock, and reasonable irrigation. *Id.*

5. **WATER-DITCH—RIGHT OF WAY.**—Where the owner of a tract of land granted to another the right of way for a mill-race, to conduct water from a stream above the land to a mill below it, the grantee did not thereby become entitled to use and appropriate the water of a small stream on the land of the grantor, which ran across the line of the race. *Miller v. Vaughn*, 333.
6. **IDEML**.—A grant of the right of way over land for a mill-race is merely an easement, and not a right to the land over which the race is constructed, nor to water flowing over the land. Such rights remain with the grantor, and no express reservation is necessary in the deed granting the right of way. *Id.*

WATER RIGHTS.

LOCAL CUSTOM CONCERNING not judicially noticed, but must be proved. See *Lewis v. McClure*, 273.

RIGHT OF WAY TO FLOW WATER across land, grant of, how construed and effect of. See *Spear v. Cook*, 380.

WHARF RIGHTS.

RESERVATION OF, in conveyance of land bounded on tide water, what is. See *Parker v. Rogers*, 183.

WILD LAND.

SUIT TO QUIET TITLE in, when maintainable. See *Thompson v. Woolf*, 454.

WILLS.

1. **CONSTRUCTION OF—VESTED LEGACY.**—A testator made the following bequest: "I give and bequeath to my nephew, F. M. S., one tenth of all my personal property, outside of my real estate, the said one tenth to be given to him when he is twenty-two years of age;" *Held*, that F. M. S. took a vested legacy; and that having died before he became twenty-two years of age, his personal representative is entitled to recover the legacy. *Warren v. Hembree*, 118.
2. **EXTRANEOUS ORAL EVIDENCE ADMISSIBLE, WHEN.**—While it is admitted to be the general rule that oral evidence is not admissible to explain or vary the words of a written instrument, there are exceptions and qualifications of the rule, where the force, operation, and construction of the written instrument are concerned. *Falsa demonstratio non nocet* has become a thoroughly established maxim of the law, the practical meaning of which is that however many errors there may be in the description either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show with reasonable certainty the intent of the devisor. Extraneous oral evidence is admissible to show the state and extent of the testator's property at the time the will was executed, in order that the court may be placed in the position of the testator at the time and be able to read the will in the light of surrounding circumstances. *Moreland v. Brady*, 303.

3. MISDESCRIPTION OF DEVISED PROPERTY.—Where a will devised to Margaret lot 2 in block 187, and to Esther lot 1 in block 187, and it appeared that the testator had no such lots as 1 and 2 in block 187, but did own lots 3 and 4 in said block: *Held*, that the erroneous part of the description might be rejected and that the remainder was sufficient to identify the property with reasonable certainty. *Id.*
4. SPEAKS FROM TIME OF TESTATOR'S DEATH.—The general rule is, that a devise, in designating the objects of the testator's bounty, speaks from the time of his death, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts as may be entitled to consideration in construing its provisions. *Gerrish v. Hinman*, 348.
5. CONSTRUCTION OF.—The will of G. provided as follows: "I devise all that may remain of my real and personal property, to each of my living children, and the children of my deceased daughters, alike." *Held*, that the latter being mentioned in their representative capacity, thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him, the property should be divided *per stirpes* and not *per capita*. *Id.*
6. IDEM.—ADOPTION OF PROVISIONS BY REFERENCE TO ANOTHER WILL.—Where the will of a testatrix otherwise properly executed refers to the will of her late husband, and so describes it as to leave no doubt of its identity, and adopts the provisions therein contained: *Held*, that it becomes a part of such will, and should be considered in construing its provisions. *Gerrish v. Gerrish*, 351.
7. IDEM.—It appears that the provisions of the will of G. are referred to, adopted, and made a part of the will of the testatrix: *Held*, that the children and grandchildren of the testatrix having been named in the will of G., are "named and provided for" in the will of the testatrix within the meaning of the statute. *Id.*
8. NAMING CHILDREN IN—OBJECT OF STATUTE.—The object of the statute is not to compel parents to make actual beneficial provisions for their children and their descendants, but to prevent the consequences of forgetfulness or oversight, and to produce an intestacy only when the child, or the descendant of such child, is unknown or forgotten, and thus unintentionally omitted. *Id.*

WITNESSES.

1. IMPEACHMENT OF—GENERAL REPUTATION.—The regular mode of examining into the general reputation is to inquire of the witness first whether he knew the *general* reputation of the person in question among his neighbors, and if his answer is in the affirmative, then he may be asked what that reputation is. *Page v. Finley*, 45.
2. IMPEACHING QUESTION, WHAT IMPROPER.—In a prosecution upon an indictment for larceny, the prosecuting witness was asked the following question by defendant's counsel: "Between the time you lost your money and the time you went out to Forest Grove, was you not on the streets of the city of Portland with L. Besser, chief of police, looking for the men that got your money, and did you not see McDonald, one of defendants, and did not L. Besser point out McDonald to you, and ask you if he was

the man that got your money?" *Held*, that the question did not relate the circumstances of time, place, and persons present, so as to entitle the defendant to impeach the witness. *State v. McDonald*, 113.

3. CHILD AS PROSECUTRIX IN RAPE MUST BE SWORN.—On the trial of a case of rape on a child, where the child is called as a witness, and found by the court not to possess sufficient intelligence to testify as a witness, the declarations of such child as to the circumstances of the alleged rape can not be given in evidence. No person can testify as a witness unless first sworn, unless by the consent of the parties. *State v. Tom*, 177.

4. CREDIBILITY OF, JURY MAY CONSIDER PROBABILITIES IN DETERMINING.—In determining the credibility of a witness, the jury may judge whether the statements made by the witness accord with their own experience in life, and their own knowledge of the motives, and interests, and passions which ordinarily influence men under such circumstances as those which surround the witness. *State v. Ah Lee*, 214.

See EVIDENCE.

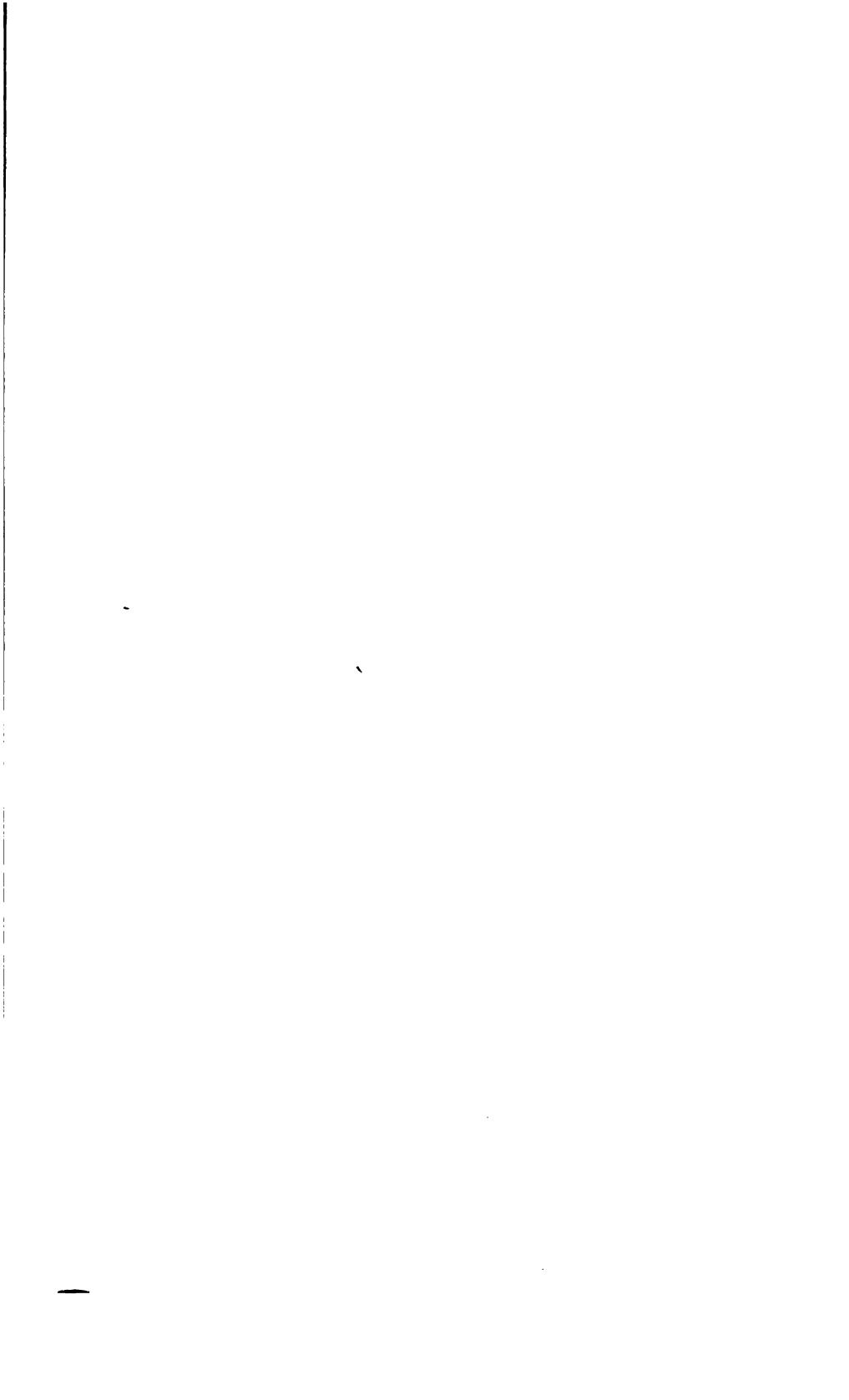
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